

United States Court of Appeals For the First Circuit

DANIEL SMITH,
DEFENDANT, APPELLANT,
v.
THE UNITED STATES,
APPELLEE.

RECORD ON APPEAL.

No. 52-154 Criminal.

THE UNITED STATES,
Plaintiff,
v.
DANIEL SMITH,
EVA SMITH,
Defendants.

APPEAL OF DANIEL SMITH AS DEFENDANT
FROM JUDGMENT AND COMMITMENT
(SWEENEY, CH.J.), ENTERED JUNE 16, 1953.

DOCKET ENTRIES.

1952

Nov. 5 Indictment filed.

17 SWEENEY, CH.J. Deft. Daniel Smith arraigned and pleaded not guilty. Bail set at \$1000. without surety. Recog. on file. W. Arthur Garrity, Jr. for deft.

17 SWEENEY, CH.J. Deft. Eva Smith arraigned and pleaded not guilty. Bail set at \$1000. without surety. Recog. on file. Richard Maguire for deft.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 52

DANIEL SMITH, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 24, 1954

CERTIORARI GRANTED JUNE 7, 1954

United States Court of Appeals

For the First Circuit

DANIEL SMITH,

DEFENDANT, APPELLANT,

v.

THE UNITED STATES,

APPELLEE,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS FROM JUDGMENT
(SWEENEY, CH. J.), JUNE 16, 1953.

RECORD ON APPEAL.

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Record on Appeal.

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- 8 Motion for extension of time within which to file special pleas, assented to, filed.
- 15 Motion by deft. Eva Smith for a bill of particulars filed.
- 15 Motion filed by deft. Eva Smith for discovery and inspection.
- 15 Motion filed by deft. Eva Smith for production of documentary evidence and objects at a time prior to trial.
- 15 Motion filed by deft. Daniel Smith for discovery and inspection.
- 15 Motion for production of documentary evidence and objects at a time prior to trial filed by deft. Daniel Smith.
- 15 Motion for the return of property and the suppression of evidence filed by deft. Daniel Smith.
- 15 Motion for a bill of particulars filed by deft. Daniel Smith.

Feb.

Mar.

June

- 5 Motion for a bill of particulars filed by deft. Eva Smith.
- 5 SWEENEY, CH. J. On motion for discovery and inspection by deft. Daniel Smith, motion allowed. Motion for production of documents, evidence and objects at a time prior to trial, allowed. Motion of deft. Eva Smith for production of documents etc. allowed. Motion for discovery and inspection by deft. Eva Smith allowed. Motion for bill of particulars by deft. Eva Smith denied. Motion for bill of particulars by deft. Daniel Smith denied. Motion for the return of property and the suppression of evidence, continued.

- 5 Government's answer to motion for bill of particulars by deft. Eva Smith, filed.
- 5 Government's answer to motion for bill of particulars by deft. Daniel Smith, filed.
- 30 SWEENEY, CH. J. Heard on motions, briefs to be submitted in one week; taken under advisement.
- 4 Stenographic record filed.
- 16 SWEENEY, CH. J. Motion for the return of property and the suppression of evidence, denied.
- 13 Stipulation filed, in regard to documents made available to defense counsel.
- 1 Motion of Eva G. Smith for separate trial, filed.
- 1 SWEENEY CH. J. Motion of Eva G. Smith for separate trial, allowed.
- 2 SWEENEY, CH. J. Jury empanelled, two alternate jurors chosen, Marien C. Lufkin appointed forelady—jury sworn; opening by Government; Trial begins; evidence; motion for the establishment of bill of particulars filed; adjourned to June 3.
- 3 SWEENEY, CH. J. Jury trial continues, evidence, adjourned to June 4, 1953.
- 4 SWEENEY CH. J. Jury trial continues, evidence. Hearing on admissibility of Joint Net Worth Statement and testimony (without jury). Government rests. Motion for judgment of acquittal as to Eva G. Smith filed and allowed on all counts. Defendant Eva G. Smith discharged. Defense begins. Evidence. Defense rests. Hearing on motion for acquittal of defendant Daniel Smith (without jury). Advisement. Defendant Daniel Smith's request for instruction filed.
- 5 SWEENEY, CH. J. Judgment of acquittal as to defendant Eva G. Smith, entered.

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- 5 SWEENEY, CH. J. Motion for acquittal of defendant, Daniel Smith allowed as to Count 5. Argument for the defense. Argument for the Government. Charge. Committed to jury at 11:25 A.M. Jury returns verdict of guilty on four counts at 12:10 P.M. Jury discharged.
- 5 SWEENEY, CH. J. Judgment of acquittal as to defendant, Daniel Smith, as to Count 5 of the Indictment, entered.
- 16 SWEENEY, CH. J. Deft. sentenced to be imprisoned on each of first four counts for one year and one day. Prison sentences to run consecutively; Fined \$5,000.00. Deft. to stand committed until prison sentences be performed and fine paid. Bail set at \$5,000.00 pending appeal.
- 16 Recog. on file, with surety.
- 16 Judgment and Commitment entered.
- 24 Notice of appeal filed by defendant, Daniel L. Smith.
- 25 Copy of notice of appeal mailed to Anthony Julian, U. S. Atty., 11th floor, Federal Bldg., Boston, Mass.
- 25 Copy of notice of appeal, with statement of docket entries, delivered to U. S. Court of Appeals.
- July 2 Stenographic record of Jury Trial before SWEENEY, CH. J., June 2 to June 5 inclusive (4 Vols.) filed.
- 16 Motion for extension of time for filing record and docketing appeal, filed.
- 20 SWEENEY, CH. J. Ordered that time for filing record and docketing appeal is enlarged to and including September 9, 1953.

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- Sept. 8 Motion for extension of time for filing record and docketing appeal, filed.
- 8 WYZANSKI, J. Time for filing record and docketing appeal is enlarged to and including October 16, 1953.
- Oct. 1 Affidavit as to contents of blackboards, filed.
- 1 Statement of points on appeal, filed.
- 1 Designation of contents of record on appeal, filed.
- 13 Counter-designation of contents of record on appeal, filed.

INDICTMENT.

[Filed November 5, 1952.]

DISTRICT COURT OF THE UNITED STATES OF AMERICA
District of Massachusetts.

At a District Court of the United States of America, for the District of Massachusetts, begun and holden at Boston, within and for said District, on the third Monday of September in the year of our Lord one thousand nine hundred and fifty-two,

The Grand Jury for the United States of America, within and for the District of Massachusetts, upon its oath charges that

COUNT ONE

On or about March 6, 1947, in the District of Massachusetts, DANIEL SMITH, sometimes known as Daniel L. Smith, and EVA SMITH, sometimes known as Eva G. Smith, both of Shrewsbury, in said District, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by them to the United States of America for the calendar year 1946, by filing and causing to be filed with the collector of Internal Revenue for the Internal

Revenue Collection District of Massachusetts, at Boston, a false and fraudulent income tax return wherein they stated that their total income for said calendar year was the sum of \$3,777.66 and that the amount of tax due and owing thereon was the sum of \$361.00, whereas, as they then and there well knew, their net income for the said calendar year was the sum of \$33,533.42, upon which said net income they owed to the United States of America an income tax of \$13,757.63, in violation of Section 145(b) of the Internal Revenue Code; 26 United States Code, Section 145(b).

COUNT TWO The Grand Jury further charges that

On or about March 8, 1948, in the District of Massachusetts, DANIEL SMITH, sometimes known as Daniel L. Smith, and EVA SMITH, sometimes known as Eva G. Smith, both of Shrewsbury, in said District, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by them to the United States of America for the calendar year 1947, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Massachusetts, at Boston, a false and fraudulent income tax return wherein they stated that their total income for said calendar year was the sum of \$4,690.27 and that the amount of tax due and owing thereon was the sum of \$528.00, whereas, as they then and there well knew, their net income for the said calendar year was the sum of \$49,738.12, upon which said net income they owed to the United States of America an income tax of \$24,273.88, in violation of Section 145(b) of the Internal Revenue Code; 26 United States Code, Section 145(b).

COUNT THREE The Grand Jury further charges that

On or about March 3, 1949, in the District of Massachusetts, DANIEL SMITH, sometimes known as Daniel L. Smith, and EVA SMITH, sometimes known as Eva G. Smith, both of Shrewsbury, in said District, did wilfully and knowingly

attempt to defeat and evade a large part of the income tax due and owing by them to the United States of America for the calendar year 1948, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Massachusetts, at Boston, a false and fraudulent income tax return wherein they stated that their total income for said calendar year was the sum of \$4,849.51 and that the amount of tax due and owing thereon was the sum of \$422.00, whereas, as they then and there well knew, their net income for the said calendar year was the sum of \$58,529.48, upon which said net income they owed to the United States of America an income tax of \$21,442.80, in violation of Section 145(b) of the Internal Revenue Code; 26 United States Code, Section 145(b).

COUNT FOUR The Grand Jury further charges that

On or about March 14, 1950, in the District of Massachusetts, DANIEL SMITH, sometimes known as Daniel L. Smith, and EVA SMITH, sometimes known as Daniel L. Smith, and EVA SMITH, sometimes known as Eva G. Smith, both of Shrewsbury, in said District, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by them to the United States of America for the calendar year 1949, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Massachusetts, at Boston, a false and fraudulent income tax return wherein they stated that their total income for said calendar year was the sum of \$3,319.85 and that the amount of tax due and owing thereon was the sum of \$198.00, whereas, as they then and there well knew, their net income for the said calendar year was the sum of \$67,581.10, upon which said net income they owed to the United States of America an income tax of \$26,289.69, in violation of Section 145(b) of the Internal Revenue Code; 26 United States Code, Section 145(b).

COUNT FIVE The Grand Jury further charges that

On or about March 14, 1951, in the District of Massachusetts, DANIEL SMITH, sometimes known as Daniel L. Smith, and EVA SMITH, sometimes known as Eva G. Smith, both of Shrewsbury, in said District, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by them to the United States of America for the calendar year 1950, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Massachusetts, at Boston, a false and fraudulent income tax return wherein they stated that their net income for said calendar year was the sum of \$4,508.01 and that the amount of tax due and owing thereon was the sum of \$471.20, whereas, as they then and there well knew, their net income for the said calendar year was the sum of \$34,208.82, upon which said net income they owed to the United States of America an income tax of \$9,618.02, in violation of Section 145(b) of the Internal Revenue Code; 26 United States Code, Section 145(b).

A True Bill.

(s) ELIOT C. LAIDLAW,

Foreman of the Grand Jury.

(s) CHARLES MILLER,

*Assistant United States Attorney for the
District of Massachusetts.*

Nov. 5, 1952

DISTRICT OF MASSACHUSETTS,

Returned into the District Court by the Grand Jurors
and filed

(s) JOHN E. GILMAN, JR.,

Deputy Clerk.

On November 17, 1952, defendant Daniel Smith was arraigned before the Court (Sweeney, Ch. J.) and pleaded not guilty.

MOTION FOR A BILL OF PARTICULARS.

[Filed December 15, 1952.]

Now comes the defendant Daniel Smith and moves that this Honorable Court order the attorney for the Government to file particulars setting forth:

(a) The source of his allegedly unreported income for each of the years 1946 through 1950, inclusive;

(b) The amount of his alleged income for each of the years 1946 through 1950, inclusive.

(s) W. ARTHUR GARRITY, JR.,

Defendant's Attorney.

Jan. 5/53

SWEENEY, Ch. J.

Denied.

**GOVERNMENT'S ANSWER TO MOTION FOR A BILL
OF PARTICULARS FILED BY DEFENDANT
DANIEL SMITH.**

[Filed January 5, 1953.]

Now comes George F. Garrity, United States Attorney for the District of Massachusetts, and on behalf of the United States of America makes the following answer to defendant's Motion for a Bill of Particulars:

The United States of America in the instant case will rely upon circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion for the years 1946 through 1950 inclusive.

GEORGE F. GARRITY,

United States Attorney,

By: (s) CHARLES MILLER,

Assistant U. S. Attorney.

**STENOGRAPHIC RECORD OF HEARING ON
MOTION FOR
BILL OF PARTICULARS.**

January 5, 1953.

The Court: Now the Bill of Particulars.

Mr. Garrity: As your Honor will see, the Bill of Particulars is identical, and asks, first, for the source of the alleged unreported income for each of the years and secondly, for the amount of the alleged income for each of the years. Now at the outset of the hearing this afternoon Mr. Miller presented to me a proposed answer to this motion for a Bill of Particulars and in that connection gave me a copy of a memorandum of law.

I would like to offer your Honor a copy on the same point [handing document to the Clerk]. Now in answer to the defendant's demand for particulars, first, as to the source and, secondly, as to what proportion of the income was attributable to each of these two defendants the United States filed the identical answer as follows:

The United States will rely upon circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion for the years 1946 through 1950 inclusive.

In other words, there is no mention as to whether the Government intends to establish a source or whether it does not. There is no mention here as to the differences, if any, of the sources of income for each of the years involved. There is only one answer for the entire indictment.

There is furthermore no distinction between the defendants. Each of the defendants filed a motion, and there is no breakdown here as between the defendant, Daniel Smith, and the defendant, Eva Smith.

Now I would like to be heard briefly on the law relating to that point, your Honor, and I am willing to rely on the

cases cited in the memorandum of law presented to your Honor of which Mr. Miller gave me a copy.

Now the first case cited in the United States Attorney's brief is United States against Chapman. I had read that for the proposition that there is no source required. Your Honor will see the Chapman case cited at page 2 of the Government's memorandum.

Well, that's a net worth case, a case similar to the case here before your Honor, and the language of the Chapman case as I read it—I went over to the library to get the book and bring it back—supports my contention here before the Court better than any case or as well as any case I have cited in my own memorandum.

The Court: You are both relying on that case. It sounds like one of my decisions.

[Laughter]

Mr. Garrity: This positively indicates that the Government must identify the source or sources from which the defendant is supposed to have derived his income.

The Court: Suppose they don't know?

Mr. Garrity: Let them say so. They haven't done that here. If they don't know, all we are, of course, looking for is a definite statement one way or the other. I say this answer that has been furnished by the Government this afternoon is altogether inadequate. It doesn't indicate one way or another. If the Government wants to say: "We don't know", that's good enough. It's all they can do. But I say that the defendant and each defendant is entitled to that under these cases, and in fact in the *Chapman* case the situation was very similar to this and the Government was ordered to file a supplemental Bill of Particulars. They filed one Bill of Particulars that wasn't unlike the Bill of Particulars filed in this proceeding, and then the defendant came back and the Court ordered that they file a sup-

plemental bill, and they did file a supplemental bill to the effect that the source of the other income was the illegal sale of meat, and so forth.

Now the case which—the *Brodella* case—which the Government also cites in its memorandum is the same type of situation. The Court in that case distinguished a case holding to the contrary, namely, the *Fenwick* case in the following language: In the *Fenwick* case the Government offered no direct testimony of any undisclosed source of income distinguishing the case from the *Brodella* case in which there was evidence offered of a source.

The Court: Mr. Miller, do you have knowledge of an undisclosed source of income?

Mr. Miller: Well, we don't—

The Court: I'm wondering if you have.

Mr. Miller: No. We can't tell you the source.

The Court: Isn't that a Yes?

Mr. Garrity: That's all I am asking for, your Honor. Here is my next point. My Bill of Particulars asks for the amount of income allegedly earned by each of these defendants. Now in that connection I have cited to your Honor in my memorandum a case which stands for what I think is a very well established rule of law, namely, that though an indictment may be joint in form it is several with reference to each of the defendants, and even though the liability of these defendants in this tax evasion case on the civil side may be joint it's certainly not joint as far as the criminal aspect of this case is concerned. And as that case, which is the *Bartlett* case I mentioned in my memorandum, states: Here the criminal liability is several. The Government and the defense in this case are at extremes with reference to that issue. As the Government states in its memorandum at page 4: The Government contends that where a return is filed jointly the amount of alleged unre-

ported income of each co-defendant is not material to the issues.

Your Honor, how is the defendant, Daniel Smith, to come in here and defend against income which he has allegedly earned if he hasn't been charged with it? The Government has lumped these defendants and I say, your Honor, that if the defendants are to have an opportunity to prepare their defense here they should know which was earned by each.

There again if the Government doesn't know we will be satisfied with their saying so.

The Court: Was this a joint return?

Mr. Garrity: Yes, your Honor.

The Court: How would the Government know?

Mr. Garrity: By virtue of its investigation of this case, I assume. I assume they are charging these persons both as principals or perhaps they have considered all of the income here was earned by my client, Daniel, and that the wife simply signed her name.

The Court: Have you segregated the items?

Mr. Miller: I can't tell by whom it was earned. I have an idea but no evidence or proof.

Mr. Maguire: If your Honor please, as far as Mrs. Smith is concerned, I wasn't sure until I got the Government's answer to our Bill of Particulars as to what theory the Government was going to try its case. Query: Whether or not she was actually accused of a 145 (b) violation as though she was a separate defendant or whether she was guilty as a principal under 18 Section 2, as an aider and abettor. They tell me she has actually violated 145 (b) and I think we are entitled to know as far as Eva is concerned and as far as Daniel is concerned as to how much, just as though it was a separate indictment.

The Court: If the Government knows, I would order

them to tell you. If they don't know, there is nothing I can say.

Mr. Maguire: Well, I'm just wondering where that leaves us. If they say they don't know—

The Court: It might be a good trial point. Do I understand the Government does not know, cannot segregate?

Mr. Miller: We can't definitely show who got it. May I be heard?

The Court: I will hear you on the motion to suppress.

Mr. Miller: On Particulars, if your Honor doesn't want to hear me, I don't care to be heard.

The Court: You say you can't segregate.

Mr. Miller: I have submitted a brief on it.

The Court: I will hear you on the motion for return of property and suppression of evidence.

Mr. Garrity: I have three witnesses whom I would like to present on this question.

The Court: I wish counsel would not hold lengthy hearings on a short motion list. Get your witnesses. How long is this going to take?

Mr. Garrity: Three-quarters of an hour to an hour, your Honor.

The Court: Adjourned until ten o'clock tomorrow.

Mr. Garrity: I have an assignment in Worcester Superior Court, your Honor. I was just notified by the United States Attorney's office to be here.

The Court: You summonsed the witnesses?

Mr. Garrity: No, I didn't, your Honor. I haven't a single witness here. I saw the people here. They are under summons by Mr. Miller. I can be back at twelve o'clock tomorrow.

The Court: All right. Be here at twelve o'clock.

Mr. Miller: Can I speak for a minute? I have three matters in the morning. When I finish I have an assigned

case I am defending in the Municipal Court tomorrow. I have three courts to be in tomorrow.

The Court: All right. Wednesday at two.

Mr. Miller: That is agreeable.

[Whereupon at 3:25 P.M. the Court adjourned]

MOTION FOR THE RETURN OF PROPERTY AND THE SUPPRESSION OF EVIDENCE.

[Filed December 15, 1952.]

Now comes the defendant Daniel Smith and moves that this Honorable Court direct that a statement entitled "Net Worth for the Years 1946 - 1950" dated on or about June 12, 1951, and the "supporting schedules" attached thereto, be returned to him and that it be suppressed as evidence against him in any criminal proceeding, for the reason that it was obtained from him by Treasury Department personnel in violation of his Constitutional rights.

(s) W. ARTHUR GARRITY, JR.,

Attorney for Petitioner.

Denied

(s) G. C. SWEENEY, *Ch.J.*

MOTION FOR JUDGMENT OF ACQUITTAL.

[Filed June 4, 1953.]

Now comes the defendant Daniel L. Smith and moves that the Court order the entry of judgment of acquittal as to him:

- (a) On the first count of the indictment;
- (b) On the second count of the indictment;
- (c) On the third count of the indictment;
- (d) On the fourth count of the indictment;
- (e) On the fifth count of the indictment;

on the ground that the evidence is insufficient to sustain a conviction of the offense charged in each of said counts of the indictment herein.

By His Attorney,

(s) W. ARTHUR GARRITY, JR.

June 5, 1953

(s) SWEENEY, Ch. J.

Allowed as to (c), fifth count.

By the Court,

(s) JOHN F. DAVIS,

Deputy Clerk.

DEFENDANT DANIEL L. SMITH'S REQUESTS FOR INSTRUCTIONS.

[Filed June 4, 1953.]

1. The net worth statement delivered by Delaney to Agent McMahon is a confession of offenses with which the defendant has been charged in the indictment before you.

2. Being a confession, it must not have been obtained by Agent McMahon from the defendant by any direct or implied promises, however slight.

3. Under a rule of evidence applied in the federal courts, it is your duty to decide whether or not a confession is made freely, voluntarily and without compulsion or inducement of any sort; and if you find that it was not so made, you must disregard it completely in your deliberations.

4. The fact that I have admitted the net worth statements in evidence does not mean that you may consider its contents without having first determined that it was made freely, voluntarily and without compulsion or inducement of any sort; you must first decide the issue of voluntariness.

5. If the net worth statement was obtained from the defendant by Agent McMahon in violation of the defend-

ant's rights under the Fifth Amendment of the Constitution of the United States, it must be disregarded by you in your deliberations.

6. The Fifth Amendment to the Constitution protects a person not only from being compelled by force to incriminate himself by a promise of immunity either direct or implied by a Government agent's conduct, if the agent intended all along not to grant the person immunity.

7. In this case, if Agent McMahon by his statements and conduct led the defendant reasonably to believe that the case would be closed on a civil basis upon submission of the net worth statement, and if he intended all along not to close the case, then the net worth statement is not admissible evidence and should not be considered by you in your deliberations.

8. Before you consider the net worth statement as evidence against the defendant, you must decide the issues of McMahon's intent and the defendant's reliance upon his statements and conduct as I have just phrased them.

9. The rule of evidence excluding confessions obtained by any direct or implied promises, however slight, does not depend or hinge upon the intent of the Government agent; in this case, if Delaney was led reasonably to believe by reason of McMahon's statements and conduct that the defendant would not be prosecuted if he submitted the net worth statement and the check, then the net worth statement should not be considered by you.

10. On these questions you should consider, among any other facts which you deem relevant on the point, the following evidence: the entry in McMahon's diary to the effect that he was instructed by Mr. Sullivan that he should not accept any form 870; McMahon's knowledge that a tax and fraud penalty totalling \$28,000.00 would be assessable against the defendant on the basis of the net worth state-

ment; that at least two days prior to McMahon's receipt of the net worth statement and check, he had been informed by Delaney that the net worth statement and a check in the amount delivered to him would be delivered to him.

12. If you find, on the basis of Delaney's testimony that McMahon told him that the case would be closed in the usual way, and if you find that the defendant relied upon McMahon's statement in delivering the net worth statement, and that McMahon did not in fact intend to close the case on the basis of the net worth statement, then it is inadmissible in evidence and should be disregarded by you.

13. A defendant may not be convicted of a crime upon the basis of his admissions unless those admissions are corroborated by independent evidence.

14. You may not consider any of the figures contained in the net worth statement as evidence of the defendant's net worth unless the particular figure has been corroborated by other independent evidence.

15. The net worth statement is evidence of the defendant's net worth at any particular time only to the extent that you find it to be a correct statement of his net worth as of the particular period.

16. If you find that Mr. Coan made gifts to the defendants from which the defendant might reasonably have acquired the assets which you find that he owned during the indictment period, then the defendant's acquisition of such assets is no evidence of his having received income during the years under indictment.

17. Each count in the indictment is a separate charge against the defendant, and you must consider each count separately and distinctly; if you find that the defendant's net worth did not increase during any of the years covered by a count in the indictment, then you must return a verdict of not guilty with reference to such count.

18. After the defendant, Eva G. Smith rested, no further evidence whether introduced by way of defense of Daniel L. Smith or in the Government's rebuttal is in evidence or admissible in the case against Eva G. Smith.

19. In this type of case, the Government has the burden of proving not only that the defendant acquired assets during a particular year covered by the indictment, but must also prove that the defendant owned each particular asset at the end of every year covered in the indictment subsequent to the year when the asset was acquired, if the defendant's net worth is alleged to have increased during such later years.

20. An increase in net worth is proved not simply by proof of a purchase of an asset; the proof must show that such asset was owned at the conclusion of the year for which an increase in the defendant's net worth on account of such asset is charged.

21. The burden is upon the Government to prove the amount of tax reported by the defendant in each of the years covered by the indictment; the Government must prove in this type of case that the signatures on each of the tax returns involved are in fact the signatures of the defendants.

22. From the beginning of the trial until the end, the district attorney has the burden of establishing beyond a reasonable doubt every fact essential to the conviction of the defendant; the defendant has no burden to sustain; it's enough that his evidence, taken with the Government's, raises a reasonable doubt as to his guilt, in which case he must be acquitted.

23. There has been testimony in the case to the effect that the defendant furnished racing information to bookies in the city of Worcester; there is nothing illegal under any Massachusetts or federal law about this occupation of the

defendant; it has been decided by the Supreme Judicial Court of Massachusetts (*Commonwealth v. Certain Gaming Implements*, 317 Mass. 160) that apparatus used in the transmission of sporting information and the results of races is not gaming or gambling apparatus; in the words of the Court's opinion, "It is, like the telephone, telegraph, or newspaper, merely one means of acquiring news including sporting information and the results of races. It serves to disclose whether a bettor *has* won or lost, but not to determine whether he *shall* win or lose. That the horses do. A winner would win, and a loser would lose, irrespective of the manner in which each might learn of his personal good or ill fortune."

24. To find this defendant guilty, you must determine in your own minds that he is guilty beyond a reasonable doubt. To determine that, you must be able to say, after all the evidence is considered and weighed, "I have an abiding conviction of the defendant's guilt," or "I am convinced of his guilt to a moral certainty." However, if you are in the frame of mind where, if it were a matter of importance to you in your own affairs, away from here, you would pause and hesitate before acting, then you have a reasonable doubt and should acquit the defendant.

25. From the beginning of the trial to the end, the Government has the burden of establishing beyond a reasonable doubt every fact essential to the conviction of the defendant. He, on the other hand, is presumed to be innocent throughout the trial and during the deliberations of the jury up until the time when, and only when, you become convinced of his guilt beyond a reasonable doubt.

26. By the Act of March 16, 1878 (28 U.S.C. 632) a defendant is not permitted to testify in a case unless he himself requests it. You should consider that there may be many good reasons entirely unrelated to his guilt or

innocence in this case why he did not take the stand, and the fact that he didn't testify cannot be taken as a presumption against him. You must not permit that fact to weigh in the slightest degree against him, and it should not enter your discussions or deliberations in the jury room at all.

27. You, the jury, are the exclusive judges of all questions of fact in this case.

28. Where a case is entirely dependent on circumstantial evidence, as this one is, you may find this defendant guilty only if the circumstances which the Government relied upon point so unerringly to the guilt of the defendant as to exclude every other reasonable hypothesis. The circumstances themselves must be proved beyond a reasonable doubt; they must be consistent with each other and inconsistent with any reasonable hypothesis but the guilt of the defendant. The circumstances must, in other words, point so unerringly to the guilt of the accused as to completely exclude any other set of facts consistent with the defendant's innocence.

29. Circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency to lead the mind to a conclusion that the fact exists which is sought to be established. It must be such as to exclude every reasonable doubt of the guilt of the defendant, and if it does not do so, or if you believe the circumstances to be as consistent with innocence as with guilt, it is your duty and you must acquit the defendant.

30. If, after you have retired, there arises a disagreement between you as to any part of the testimony, or if you desire to be informed of a point of law arising in the case, you must ask to be brought back into Court, and the information will then be given to you.

31. Now as these cases come to you an indictment has

been found against these various defendants. Well, that does not mean anything. It certainly has no bearing on the question of guilt. It is merely our method of accusing a person of a crime and under our system of government a man cannot be convicted of a crime until he has had a trial in court and until a jury of his equals has decided the facts in the case. But the indictments that are here found represent the issues that are before you today. You will decide the issues raised by those indictments and nothing else.

32. There is one other thing that I want to call to your attention and that is the fact that the two defendants in this case, the two individuals, did not take the witness stand. There is no reason why they should take the witness stand. They have a right under our law to have their case stand or fall on the Government's case. They are not required to come in and demonstrate their innocence. The Government is required to establish their guilt and the fact that they did not take the stand should not in any way have any weight in your judgment and you should draw no inference whatsoever from the fact that they did not testify.

33. To prove violations of 26 U.S.C. Section 145 (b), the offenses charged in the indictment, the Government must prove the existence of the following three elements as to each year and as to each defendant:

- (1) An attempt to evade and defeat;
- (2) Wilfullness;
- (3) An additional tax owing.

34. In this case the Government has endeavored to prove the third element, "an additional tax owing", by determining the taxpayer's income by (a) proof of expenditures, or, (b) proof of increases in net worth, or a combination of the two.

35. In order to prove that the expenditures and/or in-

creases in net worth are income, the Government must satisfy you beyond a reasonable doubt on the two following conditions:

- (a) A possible source of taxable income;
- (b) A fixed starting position as to each year which is satisfactorily established and excludes every other hypothesis or prior accumulated funds.

36. The Government in order to establish a source of income must do it in one of the two following ways:

(1) Introduce evidence of specific items of unreported income, such as testimony from meat peddlers that they paid over the ceiling prices for purchases from a defendant during the prosecution period.

(2) Introduce evidence that the taxpayer is in an income producing business from which income could have been derived. This means that the Government must show that the taxpayer is not simply a wage earner but owns or controls a business from which the allegedly unreported income could have been derived.

37. This case is based entirely upon circumstantial evidence and as a result, the burden is on the Government to prove its case, not only beyond a reasonable doubt, but to the exclusion of every reasonable hypothesis of innocence.

38. The burden is on the Government to establish a fixed starting point as to each defendant with such certainty as to exclude any reasonable hypothesis that the alleged increase in net worth could have been the result of prior accumulated funds.

39. The burden is on the Government to establish a fixed starting point for each year as to each defendant with such certainty as to exclude any reasonable hypothesis that the alleged increase in net worth could have been the result of gifts, inheritance or repayment of loans.

40. The burden is on the Government to establish a source of income subject to tax for each defendant for each year.

41. The indictment in this case though joint in form is in operation several, which means that the Government has the burden of proving the crime of tax evasion against each defendant individually.

42. The Government cannot satisfy its burden of proof in this case by proving a joint increase in net worth. The burden is on the Government to prove the case as to each defendant as an individual.

43. If the Government fails to prove any one of the elements of the crime against Eva or against Daniel, that defendant should be acquitted.

44. Being a net worth case which is based entirely upon circumstantial evidence, the Government as to each defendant in order to satisfy its burden of proof must exclude every reasonable hypothesis that each defendant may have had prior accumulated funds.

45. Being a net worth case which is based entirely upon circumstantial evidence, the Government as to each defendant in order to satisfy its burden of proof must exclude every reasonable hypothesis that each defendant may have received the alleged unreported income from gifts, inheritance or repayment of loans during the indictment years.

By his attorney,

(s) W. ARTHUR GARRITY, JR.

On June 2, 1953 the matter came before the Court (Sweeney, Ch. J.) for trial with jury. Trial continued until June 5, on which day, the matter was committed to the jury for verdict. The jury returned a verdict of guilty on four counts.

JUDGMENT AND COMMITMENT.

[Entered June 16, 1953.]

No. 52-154 Criminal.

UNITED STATES OF AMERICA,

v.

DANIEL SMITH, sometimes known
as DANIEL L. SMITH.

On this 16th day of June, 1953 came the attorney for the government and the defendant appeared in person and by counsel

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and verdict of guilty of the offense of violation of Sec. 145 (b) of the Internal Revenue Code; 26 U.S.C. Section 145 (b)—Income Tax Evasion—as charged in four counts of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one year and one day on each of the first four counts of the indictment; prison sentences to run consecutively, and it is

FURTHER ADJUDGED that the defendant be and is hereby sentenced to pay a fine of \$5000.00 and to stand committed until prison sentences be performed and fine paid.

IT IS ADJUDGED that

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Mar-

shall or other qualified officer and that the copy serve as the commitment of the defendant.

(s) GEORGE C. SWEENEY,

United States District Judge.

The Court recommends commitment to:

_____,
Clerk.

TESTIMONY.

Court Room No. 1, Federal Building,
Boston, Mass.,

Tuesday, June 2, 1953, 10 a.m.

JOHN J. ROCHE (partially condensed).

Witness is employed at the Office of the Collector of Internal Revenue and has custody of tax returns filed by Massachusetts taxpayers. He identifies the joint tax returns of Daniel L. Smith and Eva G. Smith for the following years and they are admitted as Exhibits as follows:

1946—	Exhibit 1
1947—	Exhibit 2
1948—	Exhibit 3
1949—	Exhibit 4
1950—	Exhibit 5

He identifies a photostat of the defendants' joint return for 1945 and it is admitted without objection as Exhibit 6.

Regarding years prior to 1945, the verbatim testimony was as follows:

"Q. Now, can you tell his Honor and the members of the jury the situation with respect to income tax returns up to and including the year 1944? A. A search was conducted, and for the years 1936 through and including 1939 no record of a return having been filed could be found. A

non-taxable return was filed for the year 1940 and a taxable return was filed for 1941; for 1942 a non-taxable return was filed; for the year 1943 a non-assessable return was filed; and for the year 1944 a refundable return was filed."

Q. — "What is the situation with respect to original tax returns for the calendar year 1944 and prior years? A. The only returns that are retained are returns that show an outstanding account, or a return on which there is litigation pending. All of the rest of them are destroyed in accordance with an act of Congress."

ALBERT ERICKSON, SWORN.

Direct Examination by Mr. Miller.

Q. Do you have with you a signature card in connection with a savings account of one Eva G. Smith? A. Yes, I have.

Q. And would you read what appears on this card? A. "Account No. 255830", in the name of Eva George Smith; the residence is 36 William Street, Worcester; "Occupation, not working; age 34; birthplace, Worcester, Mass.; father's name Joseph J. George; mother's maiden name Edith Massad." This is dated April 24, 1942.

(Partially condensed).

Witness is the head bookkeeper at the People's Savings Bank in Worcester; he has with him a signature card in connection with a savings account of Eva G. Smith, No. 255830; he has the original ledger sheets, which show balances on the following dates as follows:

December 31, 1945	\$ 222.95
December 31, 1946	721.52
December 31, 1947	736.01
December 31, 1948	1,568.90

December 31, 1949	1,600.42
December 31, 1950	132.58

He has the records of another account, of John J. George and Eva G. Smith, payable to either or the survivor, No. 295428; the account opened on April 15, 1948; the balances on the following dates were as follows:

December 31, 1948	\$3,184.48
December 31, 1949	1,782.93
December 31, 1950	116.56

The date of the first withdrawal on the first of the two accounts, No. 255830, was September 13, 1950 in the amount of \$1,500; witness has the pertinent withdrawal slip signed by Eva G. Smith; payment was made to her in conjunction with a withdrawal of \$1,700 from account No. 295428 pursuant to a withdrawal slip signed by Eva G. Smith on the same date, September 13, 1950; payment of the two sums was made by a check for \$3,200 payable to the Falmouth Bowling Club endorsed "For deposit only Falmouth Bowling Club Elsie T. George, Treas."

The remainder of the testimony follows verbatim:

"Mr. Miller: I would like to offer this check for \$3200, the two deposit slips, the two ledger cards, and the signature cards that we have already talked about.

Q. Now, I see there is another signature card, that on the other account. A. It is a joint account.

Q. The second account? A. The second account.

Q. And will you tell us the signature that is on the signature card, read the name? A. "John J. George, 2 Falcon Street, Worcester, Mass."

Q. That is on the 295428, which is the second one, the joint account; that is the signature card on the other deposit; is that correct? A. Yes.

Mr. Miller: I offer these.

Mr. Garrity: I object to their admission against my

client, Mr. Daniel Smith, your Honor, and ask they be limited.

The Court: I will allow them in as against Eva Smith at the present time.

Mr. Garrity: No objection otherwise.

[Documents concerning accounts in People's Savings Bank, marked Government's Exhibit 7.]

The Court: (To jury) The jury will note that that is a record of transactions, apparently, between Mrs. Smith and the bank; so that is only going in as evidence against her. Possibly it may be connected with the husband later. I do not know. But that is admitted against her only.

Q. Now, I direct your attention to the account No. 295428, which is the second account, the joint account, and ask you if there was a withdrawal made from that account on April 15, 1949? A. Yes, there was.

Q. And what is the amount of that withdrawal? A. \$4,000.

Q. By whom is it signed? A. John J. George.

Q. And I will ask you if you have a check or other evidence of the manner in which that \$4,000 was paid? A. That was paid by check payable to the National Shawmut Bank of Boston, Trustee.

Q. In the amount of— A. Four thousand dollars.

Q. And it is dated the same date as the withdrawal? A. The same date.

Q. That is endorsed by whom? A. It says, "Credited to the account of absence of endorsement guaranteed the National Shawmut Bank of Boston Trust Dept."

Mr. Miller: I offer in evidence the withdrawal slip and the check.

Mr. Garrity: I will have the same objections throughout. If your Honor allows them in and limits them as to the defendant Eva—

The Court: All right, I will so receive them.

Mr. Garrity: There are others on this but I won't bother to request my objection be noted each time.

The Court: All right. I will protect your interests each time.

[Withdrawal slip and check of People's Savings Bank marked Government's Exhibit 8.]

Mr. Miller: I guess that is all, Mr. Erickson. Do you wish to inquire, Mr. Garrity or Mr. Maguire?

Mr. Maguire: No, sir.

Mr. Garrity: No questions.

Mr. Miller: O. K. Mr. Jones.

ARTHUR S. JONES (condensed).

Witness is assistant secretary of the Worcester Federal Savings and Loan Association; he has with him records pertaining to two accounts; account No. 31049 is in the names of John J. George or Eva George Smith, and was opened December 3, 1947 by a deposit of \$10,000; the balances on the following dates were as follows:

December 31, 1947	\$10,020.80
December 31, 1948	10,272.87
December 31, 1949	5,405.49
December 31, 1950	5,541.46

Witness has a photostat of the signature card and the original ledger card. On March 28, 1949, there was a withdrawal of \$5,000.00 evidenced by a check in that amount payable to the John Hancock Mutual Life Insurance Company; witness has the check and reads the endorsements; the documents relating to this account are admitted as Exhibit 9.

Another account, No. 16100, was opened January 16, 1941; the witness has two signature cards, one signed by Eva George Smith or John J. George and the other by

Eva George Smith; witness has the ledger cards on this account and the balances on the following dates were as follows:

December 31, 1945	\$ 1,079.60
December 31, 1946	13,103.82
December 31, 1947	13,433.43
December 31, 1948	13,771.35
December 31, 1949	4,891.35
December 31, 1950	4,952.48

On March 28, 1949, there was a withdrawal of \$9,000; witness has a cancelled check of that amount on that date made to the order of John Hancock Mutual Life Insurance Company and endorsed by it; the check, signature cards and ledger sheet are admitted as Exhibit 10.

CHARLES H. MACPHEE, SWORN.

Direct Examination by Mr. Miller.

Q. You have the signature card there? A. I do, sir.

Q. Whose signatures are on the card? A. "John J. George" and "Eva F. George."

Q. And on the address of Eva F. George on the back, would you read the information furnished there with respect to Eva George? A. Yes, sir.

Q. Read the question printed and the answer? A. "Residence address, 575 Grafton St., Worcester. Business address, 311 Main Street, Worcester.

"Father's name, Joseph J., mother's maiden name, Edith."

"Husband's name, Daniel. Occupation, housewife. Date of birth November 25, 1907. Place of birth, Worcester, Mass."

(Condensed).

Witness is chief clerk of the Guaranty Bank and Trust

Company of Worcester; he has records of a savings account No. 17151 in the names John J. George or Eva F. George, opened December 16, 1946 by a cash deposit of \$2,000; the original deposit slip reads J. J. George; the signature card bears the signatures John J. George and Eva F. George; the ledger card shows balances on the following dates as follows:

December 31, 1946	\$2,000.00
December 31, 1947	6,017.24
December 31, 1948	1,054.73
December 31, 1949	1,075.41
December 31, 1950	1,096.50

On August 20, 1947, John J. George made a \$4,000 cash deposit; on February 10, 1948, a withdrawal slip signed John J. George covered a \$5,000 withdrawal in the form of a Savings Department check for \$5,000 payable to John J. George and endorsed by him and Paine, Webber, Jackson & Curtis; the signature card, ledger card, deposit tickets, withdrawal ticket and check were admitted as Exhibit 11.

GEORGE C. HOLDERNESS (condensed).

Witness is assistant treasurer of Hampden Savings Bank of Springfield; he has the records of account No. 97740, the joint account of John J. George and Eva George Smith, opened November 23, 1946; he has original signature cards, one signed by John J. George and the other by Eva George Smith; he has the original ledger card and a deposit slip of November 23, 1946 showing a cash deposit of \$500.00; the balances on the following dates were as follows:

December 31, 1946	\$ 500.00
December 31, 1947	7,458.02

December 31, 1948	537.92
December 31, 1949	548.72
December 31, 1950	559.74

On January 10, 1947, there was a deposit of a check for \$915.00; on February 20, 1947, there was a deposit of a check for \$3,000; on March 1, 1948, there was a withdrawal of \$7,000 in the form of a check payable to John J. George and endorsed by him and Paine, Webber, Jackson & Curtis; the signature cards, ledger sheet and check were admitted as Exhibit 12.

LAWRENCE H. CROSS (condensed).

Witness is treasurer of the Worcester Five Cents Savings Bank; a savings account was opened by Eva M. George on June 10, 1940; it became the joint account of Eva M. George or John J. George on March 6, 1946; the balances on the following dates were as follows:

December 31, 1945	\$1,704.23
December 31, 1946	8,029.81
December 31, 1947	8,167.79
December 31, 1948	8,331.95
December 31, 1949	6,430.86
December 31, 1950	518.91

On December 13, 1949, a passbook loan of \$6,000, signed for by John J. George, was made and a check in that amount was issued payable to Daniel L. Smith and endorsed by him to Lester T. Crane or Helen B. Crane; on January 3, 1950, the loan was automatically repaid by a withdrawal charge against the account; the transaction was made in the form of a loan to save interest; on April 15, 1949, a withdrawal of \$8,000 was made in the form of a check in that amount payable to the National Shawmut Bank of Boston and endorsed to the bank's trust depart-

ment; the original signature card, the subsequent one making it a joint account, the ledger card, and the checks representing the two withdrawals were admitted as Exhibit 13.

JOHN J. FLYNN (partially condensed).

Witness is vice president of the Worcester County Trust Company; he has the original signature card signed by Eva G. Smith for a commercial account opened January 24, 1946; the ledger sheets and bank statements show balances on the following dates as follows:

December 31, 1946	\$ 95.81
December 31, 1947	397.32
December 31, 1948	747.45
December 31, 1949	534.47
December 31, 1950	738.16

He has the following treasurer's or cashier's checks: one for \$4,000 issued March 8, 1948 payable to Daniel Smith endorsed by him to Paine, Webber, Jackson & Curtis; one for \$4,000 issued April 15, 1949 payable to the National Shawmut Bank of Boston, Trustee and endorsed by its trust department; one for \$6,000 issued June 10, 1949 payable to the National Shawmut Bank of Boston, Trustee and endorsed by it; these checks are issued to an individual who pays for them by check or cash at the time of issuance.

On December 1, 1949, the bank honored a check which came to it for collection from the Chase National Bank of New York, the owner of the check being Sarol Furs Company, Incorporated, in the amount of \$3,750, which amount was charged against Eva Smith's commercial account; witness does not have possession of the check.

The three cashier's checks and the signature card were admitted in evidence as Exhibit 14.

The verbatim testimony thereafter was as follows:

Q. "Do you have with you any record indicating a purchase of any War Savings Bonds by Eva Smith or Eva George? A. Yes, sir.

Q. What do your records indicate? A. An application for U. S. Savings Bonds Series E, dated December 30, 1946, application for five \$1,000 Series E bonds.

Q. Five \$1,000 Series E bonds. And do your records indicate when the bonds were purchased? A. December 30, 1946.

Q. And how were they paid for? A. Not on this slip here.

Q. Do you have any other memorandum or records that would indicate as to the manner of purchase of these bonds? Incidentally, to whom were the bonds issued, the payee's name? A. "Miss Eva F. George or John J. George, 575 Grafton Street, Worcester, Mass."

Q. What was the price of those bonds? A. The cost price, \$3750 for five thousand matured value.

Q. Do you have the serial numbers on those bonds? A. I have part of the serial numbers written on it, I believe. They are on the sheet, "1662170.

Q. "1662170"? A. Yes.

Q. Five one thousand maturity? A. Yes.

Mr. Miller: I would like to offer in evidence this part of the transaction concerning this.

Mr. Maguire: No objection.

[Application for U. S. Savings Bonds, dated December 30, 1946, \$5,000, marked Government's Exhibit 15.]

Mr. Miller: All right. Thank you very much, Mr. Flynn."

SAMUEL G. REA, JR. (condensed).

Witness is head teller at the Worcester County Institution for Savings; he has the original signature card in the name of Eva F. George or John J. George; the account was opened October 13, 1931 and became a joint account on March 6, 1946; the balances on the following dates were as follows:

December 31, 1945	\$1,514.88
December 31, 1946	8,004.60
December 31, 1947	8,113.75
December 31, 1948	8,297.23
December 31, 1949	3,684.00
December 31, 1950	3,756.20

On December 13, 1949, there was a withdrawal of \$4,200 in the form of a check payable to Daniel L. Smith and endorsed by him to Leslie T. Crane and Helen B. Crane; on April 15, 1949, there was a withdrawal of \$8,000 in the form of a check payable to the National Shawmut Bank of Boston, Trustee and endorsed by its trust department; on March 28, 1949, a cashier's check for \$18,000 was issued payable to the John Hancock Mutual Life Insurance Company and endorsed by it, which check was purchased either by cash or check, but in no way charged against the savings account; the original signature card, the ledger cards, two checks representing withdrawals and one cashier's check were admitted as Exhibit 16.

DEAN E. STOREY (condensed).

Witness is assistant treasurer of the Worcester Mechanics Savings Bank; he has records of a savings account in the name of Dean Muir and J. Ruth Smith, opened June 14, 1935; on December 13, 1949, a loan of \$7,300 was made

on the bankbook in the form of a check in that amount dated December 12, 1949 payable to Daniel L. Smith and endorsed by him to Lester T. Crane and Helen B. Crane; after the January 15, 1950 interest was credited to the book, the loan was repaid by a withdrawal charge against the account; on February 13, 1948, a withdrawal of \$7,000, signed for by Dean Muir, was made in the form of a check payable to Paine, Webber, Jackson & Curtis and endorsed by it; these were the only withdrawals from January 1, 1946 through December 31, 1950; witness has seven deposit slips for 1946; cash deposits were made on the following dates in 1946 as follows:

January 4	\$270.00
January 8	250.00
January 14	350.00
February 4	400.00
February 15	550.00
March 5	500.00
March 20	400.00
March 21	500.00
April 3	600.00
May 29	20.00
June 4	605.00

The account's balances on the following dates were as follows:

December 31, 1945	\$3,536.92
December 31, 1946	8,064.14
December 31, 1947	8,226.22
December 31, 1948	7,494.10
December 31, 1949	7,644.73
December 31, 1950	425.38

He has two signature cards, one signed Dean Muir and the other J. Ruth Smith; the signature cards, ledger cards,

deposit slips for 1946 and the checks representing withdrawals were admitted as Exhibit 17.

JANET RUTH SMITH (condensed).

Witness resides in Manchester, N. H. and is a sister of Daniel L. Smith; she identifies her signature on the signature card of the account at the Worcester Mechanics Savings Bank which was admitted as part of Exhibit 17; she signed the card at the request of her brother; she had nothing further to do with the account after signing the card; she made no deposits or withdrawals; she knows nothing more about the account.

JOHN J. GALLIVAN (condensed).

Witness is assistant treasurer of the Bay State Savings Bank; he has the signature card of a savings account opened December 14, 1946 by John J. George and Eva F. George; an initial deposit of \$1500 cash was made on that date; balances on the following dates were as follows:

December 31, 1946	\$1,500.00
December 31, 1947	8,065.88
December 31, 1948	8,227.99
December 31, 1949	3,343.36
December 31, 1950	3,410.55

On January 4, 1947, a cash deposit of \$500 was made; on April 3, 1947, a deposit of \$6,000 was made; on March 28, 1949, John J. George made a withdrawal of \$5,000 in the form of a check in that amount payable to the John Hancock Mutual Life Insurance Company and endorsed by it; the check, signature card, and ledger card were introduced in evidence as Exhibit 18.

RICHARD L. WARD (condensed).

Witness is assistant auditor of the Mechanics National Bank of Worcester; John J. George and Eva Smith opened a commercial account in the name of Bartlett Street Realty Company on May 31, 1946; statements were mailed to John J. George; numerous deposits were made and checks issued during the years 1946 through 1950; balances on the following dates were as follows:

December 31, 1946	\$468.91
December 31, 1947	289.60
December 31, 1948	174.39
December 31, 1949	237.66
December 31, 1950	519.99

The original signature card was admitted in evidence as Exhibit 19.

JOHN J. GEORGE, Sworn.

Direct Examination by Mr. Miller.

Q. What is your full name, sir? A. John J. George.

Q. Where do you live, sir? A. 2 Falcon Street, Worcester, Mass.

Q. Your occupation? A. Attorney at law.

Q. And you are related to the defendants? A. I am related to the defendant Eva Smith, who is my sister, and Daniel L. Smith, who is my brother-in-law.

Q. And Eva Smith, your sister, the defendant, maiden name was Eva George; is that correct? A. That is correct, sir.

Q. Now, you have been in court most of the morning, have you, Mr. George? A. That is correct, Mr. Miller.

Q. And you heard some of these witnesses, bank em-

ployees, read off certain bank records? A. I heard all of them this morning.

Q. All of them? A. That is right.

Q. In those bank records that were read into evidence, many of them—I will take them up in detail—you were listed as a joint depositor; is that correct? A. That is correct, Mr. Miller.

Q. In many of those instances when sums of money were withdrawn and paid over, they were paid either to various concerns or in some instances to you; is that correct? A. That is right.

Q. In those instances that we have already heard this morning in which a check was payable to you, can you tell us whether or not you retained the proceeds of the check? A. I did not.

Q. What did you do with those proceeds? A. I would turn them over to my sister, Mrs. Smith.

Q. In these bank accounts, all of them we have heard already in which you were a joint depositor, of those we have heard this morning did you have any interest in those accounts? A. I did not, Mr. Miller.

Q. You were, shall we say, a straw depositor? A. If you want to express it that way.

Q. Would you care to describe it in your own words? A. No, I will accept your terminology.

Q. You did that as a straw or more or less for accommodation; is that correct? A. For my sister, Mrs. Smith.

Q. For your sister? A. That is correct.

Q. And all of the funds that went into those accounts were not furnished by you; is that correct? A. That is correct.

Q. We have two other accounts, Mr. George, of which you may have some knowledge, in which the bank officials have not yet testified. One is the Springfield National

Bank, in which the account was in the names of John J. George and Eva Frances George. Do you recall that particular account? A. I do, Mr. Miller.

Q. Did you have any interest in that account? A. I did not.

Q. There was another account in the Springfield Institution for Savings, No. 44949, in the name of Eva Frances Smith and John J. Smith. Do you recall that account? A. Yes, I do.

Q. Did you have any interest in the account? A. I did not, Mr. Miller.

Q. You heard someone testify concerning a purchase of five \$1,000 Series E War Bonds. You heard that testimony? A. I believe I did.

Q. Did you have any interest in those bonds? A. I did not.

Q. You did not furnish any of the money with which to buy them? A. I did not furnish any of the consideration.

Q. And you have no interest in the bonds or their proceeds; is that right? A. I do not have any interest in those bonds; that is right.

Q. On or about June 12 of 1951, did your brother-in-law, the defendant Daniel L. Smith, ask you to notarize his signature on this paper that I now show to you? A. That is correct, he did.

Q. That was on June 12, was it? A. Yes, June 12, 1951.

Q. He signed his name to this paper in your presence? A. That is right.

Q. As a notary public you took his oath; is that right? A. That is right.

Q. Subscribed your name to it? A. That is right.

Q. He signed more than one copy, did he? I have another

copy. If I show you— A. You will have to refresh my memory on that.

Q. If I show you the other copy as well as this, would you look at it and will you tell us if your memory is the same? A. Yes.

Q. You would say he signed both of those, the original and the copy, and you took his oath? A. That is right.

Q. Do you know anything about this statement? A. No, not a thing.

Q. Just that you took— A. Just that I took his jurat.

Q. As a notary public? A. That is right.

Mr. Miller: I am not now offering these in evidence but I want to have them marked for identification.

The Court: Mark them for identification.

Mr. Miller: And I think I will just offer the original.

[Net worth statement marked Government's Exhibit 20 for identification.]

Q. Now, did you keep a record or keep records of any mortgages on property that was owned by your sister, real estate? Did you keep any records of any mortgages? A. I kept a record.

Q. A record? A. Yes.

Q. Of one mortgage? A. One mortgage.

Q. And what mortgage was that? A. Bartlett Street property.

Q. What did the Bartlett Street property consist of? A. It is a commercial building for semi-heavy machinery and has approximately four floors to it, located at 9-11 Bartlett Street, Worcester, Mass. It is a brick structure.

Q. Brick. And there were tenants in the building and they paid rent; is that right? A. They would mail in the rent.

Q. That account was kept in the— A. In the Mechanics National Bank.

Q. And you were the attorney and you would— A. I took care of the income and expense accounts.

Q. Did you issue checks against expenses? A. That is right.

Q. Do you remember when that property was acquired? A. May, 1946, I believe.

Q. And do you know what the purchase price of the property was? A. I think the entire purchase price was approximately thirty-eight thousand, with some odd dollars attached to it, paid in the form of a 33,000 mortgage and the balance in cash or by check.

Q. Well, in any event, there was a mortgage of \$33,000? A. That is correct, Mr. Miller.

The Court: We will take the noon recess until two o'clock.

[Recess from 12:40 to 2 p.m.]

AFTERNOON SESSION.

JOHN J. GEORGE, Resumed.

Direct Examination by Mr. Miller, Continued.

Q. Now, Mr. George, I was asking you about a piece of property known as a brick building on Bartlett Street, I believe. Is that correct? A. That is, Mr. Miller.

Q. To your knowledge, that property was purchased on May 29, 1946; is that right? A. I believe that is the date.

Q. Well, I show you here any income tax return for the year 1946, and on the back of that return under Schedule B, Income from Rents and Royalties, there is an item "Brick Building," and then under Schedule F, Explanation of Deduction for Depreciation Claimed, there is the item "Brick Building," bought May 29, 1946, \$35,600, and

then the depreciation for the year. Are those figures familiar to you? A. I believe that—yes.

Q. Now, did you have something to do with these particular figures on this return, on the brick building? A. Yes, sir.

Q. Then, after looking at this return, is your memory then refreshed as to the cost of that brick building? A. I believe it was about \$35,600.

Q. That is called Bartlett Street? A. Bartlett Street. 9-11.

Q. There is another Bartlett Street, is there, so we will call it Bartlett Street building. That was acquired in 1946, and the cost of that building was how much? A. \$35,600.

Q. And there was a mortgage, you say, taken out at the time it was purchased? A. Yes, sir.

Q. You handled the transaction, did you not? A. That is right.

Q. You represented the purchasers? A. That is right.

Q. And at the time the property was bought there was a mortgage given back for \$33,000; is that right? A. That is right, Mr. Miller.

Mr. Miller: Well, we will just call that "Mortgage Bartlett Street, \$33,000" (writing on blackboard).

Q. Now, were payments on principal and interest made periodically on that mortgage, to your knowledge? A. I think the principal was paid off at the rate of about a thousand dollars a year.

Q. A thousand dollars a year. Whose name was this building in? A. Eva G. Smith.

Q. Eva G. Smith. And do you know who made the payments on the mortgage? A. I did.

Q. You made them? A. That is right, sir.

Q. Do you know how much was paid off? Was it a thousand dollars each year? A. That is right.

Q. And at the end of 1950 do you know if approximately five years' payments had been made, or whether there were more or less? A. Well,—

Q. Was the property sold somewhere along the line there to your knowledge? A. Property sold?

Q. Yes. A. No, sir.

Q. They still own it? A. Yes, sir.

Q. Now, coming down to other real estate, do you know anything about the house in which they were living in 1946, January 1, 1946; were they still living in William Street, do you know? A. I am not sure, sir.

Q. Well, some time during the period between 1946 and 1950 they bought a house on James Road in Shrewsbury; is that correct? A. That is correct, sir.

Q. Do you know when that house was bought? A. No, I do not.

Q. Did you represent— A. No, sir.

Q. You had nothing to do with that transaction at all? A. No.

Q. So you know nothing about it? A. That is right, sir.

Q. Were you the attorney in connection with the purchase of a summer home at Falmouth? A. Yes, sir, I was.

Q. Do you know when the summer home at Falmouth was purchased?

Mr. Maguire: Can you help with the date?

Mr. Miller: Yes, I am going to.

Q. Well, was it some time in 1948, to the best of your knowledge? A. To the best of my knowledge.

Q. Do you remember the purchase price of the house in Falmouth? A. I believe it was about \$20,000.

Q. Well, would it refresh your memory if I mention the price of \$15,000 for the house and \$2,000 for furniture, making a total of \$17,000? A. My memory isn't very—I am not sure. It may be right, yes.

Q. You originally thought it was twenty but it may have been seventeen? A. Yes.

Q. In that neighborhood. Do you know whether there was a mortgage taken back on that? A. I do not believe so, sir.

Q. Do you know how the purchase price was made. Was it in the form of a check or cash? If you don't know, it's all right. A. I can't say.

Q. Do you know whether or not the price of \$17,000 was paid in full at the time, whether it was in the form of a cash payment or check? A. That's right.

Q. Payment in full was made and there were no mortgages, and that was a summer residence in Falmouth, and there was \$15,000 for the building and \$2,000 for furnishings. Now, to your knowledge, did Mrs. Smith acquire an interest in a place known as the Falmouth Bowling Club? A. She did, sir.

Q. Were you listed on the application or the original papers as an officer or director of the club? A. That is right, sir.

Q. And you have been— A. That is right, sir.

Q. You have been at the place? A. Oh, yes.

Q. What was the club? Will you tell his Honor and the jury? A. Well, it is a one-story building; it has a circular bar as you enter the premises, and then there is a dividing wall between the cocktail lounge and the dining room.

Q. Well, I mean would you describe it in a more general way, that is, is there a restaurant, is there dancing, is there a bar, what is the seating capacity, and so forth, and things of that general sort. A. Well, if I may reiterate, there is a cocktail bar as you enter the place which may hold about 150 people, or 100 people, thereabouts.

Q. Between 100 and 150 people at the bar and at the tables? A. At the cocktail lounge. In the dining room you

may have seating capacity for about another 100 or 150 people; and then there is a small, little dance floor at the further end of the dining room where dances are held Saturday nights, and sometimes when an organization rents the place they have their orchestra come in and play for them on other nights.

Q. As far as you know, this place is a night club, a drinking, eating and dancing establishment; is that correct?
A. Well, it is an association.

Q. Are there any other activities that are conducted there other than those that you have just described?
A. Well, it is a meeting place for other organizations in the community, and, as I mentioned before, different organizations may have their—

Q. Affairs? A. —affairs there, and they may stipulate for the price of the meal and bring their own orchestra, something of that nature.

Q. Now, there is no bowling there, is there? A. There is no bowling.

Q. But it is known as the Falmouth Bowling Club?
A. That is right, sir.

Q. And is one of the rooms known as the Surrey Room?
A. Surrey Room.

Q. Which room is the Surrey Room? A. Well, I think that that is the term for the entire structure, probably. It is known as the Surrey Room.

Q. You mean the entire place is known as— A. That is right.

Q. How does the name, the Falmouth Bowling Club come into it? A. That was the original corporation.

Q. But the place is known as the Surrey Room, is it?
A. That is right, sir. That is the name it is known by.

Q. Do you know the approximate date when the previous owners transferred title? A. I believe it was in 1948.

Q. Well, is it possible that it was transferred in 1949?

A. It is possible.

Q. 1949? A. Yes.

Q. And were the previous owners individuals named Lester Crane and his wife? A. That is right, sir.

Q. They operated it as the Surrey Room; is that right?

A. That is right.

Q. To whom did they, to your knowledge, transfer the title to the Surrey Room at Falmouth Bowling Club; to your knowledge to whom was title transferred? A. I represented Mrs. Smith on the transaction, and as far as I know title was transferred to her.

Q. To Mrs. Smith? A. That is right.

Q. Not to Daniel Smith? A. That is right.

Q. But some of the checks that were used for the payment of the purchase price were bank checks made out to Daniel Smith and by him endorsed and turned over to the Cranes; is that correct? A. Well, part of the transaction was handled by another attorney, sir, so I can't speak of my own knowledge on that.

Q. I am only asking you as far as you yourself know of your own knowledge. If you know, whether or not any checks were handed over? I have the originals here if I use the photostats or pick out the originals.

Mr. Maguire: Use the photostats.

Q. I am showing you here a check, of which the original is already in evidence, made out to Daniel Smith and by him endorsed by the Cranes. A. Yes.

Q. And the date of the check is what? A. December 13, 1949.

Q. Then there is another of December 13, 1949, for \$6,000. That came from the Worcester Five Cents Savings, and this came from the Worcester County Trust. A. Yes, sir.

Q. This other check I believe is similarly endorsed. Do you recall seeing the originals of these checks at the time of the transfer of title? A. Yes, sir.

Q. Do you recall, was Mr. Smith present at the time? A. Mr. Smith was present, and I believe that Mrs. Smith was present.

Q. Were they endorsed in your presence or had they already been endorsed by Daniel L. Smith? A. I do not remember that, Mr. Miller.

Q. As far as you know, these checks formed part of the purchase price; is that correct? A. That is correct.

Q. Do you know what the total purchase price was? A. I believe it was \$75,000.

Q. Seventy-five thousand? A. Of which forty was a mortgage.

Q. In other words, they bought, as far as you know, the land, the building, the facilities, the license, everything,—furniture, equipment, whole works,—for \$75,000, of which \$40,000 was taken back as a mortgage; is that correct? A. Mrs. Smith. Yes.

Q. Do you know who signed the mortgage? A. I believe that Mrs. Smith signed the mortgage, and I think—

Q. Did Daniel Smith sign the mortgage? A. Mrs. Smith signed the mortgage. Are you speaking about the realty mortgage, Mr. Miller? I don't understand.

Q. You said there was a 40,000 mortgage. Was there more than one mortgage? A. I thought there is a personal property mortgage. I am not sure.

Q. Which mortgage did Mr. Smith sign? And which did Mrs. Smith sign, if you remember. A. I think he released his courtesy interest in the realty property, and I think that he signed a personal property mortgage. I am not sure about that.

Q. But the mortgages totaled \$40,000? A. That is right.

Q. Covering the real estate and the personal property?

A. That is right.

Q. That meant there was a difference of \$35,000, and was that paid at the time, \$35,000 paid to the sellers?

A. That is right.

Q. That was Lester Crane and his wife? A. His wife.

Q. And that thirty-five was paid by checks and other items; is that right? A. That is right, Mr. Miller.

Q. That much money was paid out? A. Yes.

Q. Now, Mrs. Smith is your sister. When did she get married to Daniel Smith? Just the year. A. I think it was around 1939.

Q. Around 1939? A. Somewhere around there.

Q. Well, that is close enough. Now, after she was married to your brother did she— A. No, to my brother-in-law.

Q. Brother-in-law—I am sorry. After she was married to Mr. Smith where did they live, if you know? A. I believe that they lived on William Street.

Q. How long did they live on William Street, do you know? A. Well, I do remember at the time I went in the Army they were still living on William Street, I believe. That was in 1942.

Q. Where did they move after William Street? A. St. James Road in Shrewsbury.

Q. So they have only lived at two addresses during—in Worcester? A. That is right.

Q. One at William and one at St. James Road? A. That is right.

Q. So they moved to St. James in 1946, was it,—St. James Road? A. I don't know that.

Q. You don't know when they moved? A. I don't know when they moved.

Q. Now, during the time that you were around—you

were living in the same city, of course? A. No, I was living in Springfield at the time I went in the Army the first part of 1942.

Q. And when did you come out of the Army? A. In the latter part of 1943.

Q. When you got out in 1943 did you stay in Worcester? A. That is right.

Q. Did you see your sister periodically from 1943 up to— A. Oh, yes.

Q. Did she have any occupation, to your knowledge? A. No, she was a housewife when I came back from the Army.

Q. During all the time from the time you returned from the Army up until the end of 1950 she had no occupation, than housewife; is that right? A. That is right, Mr. Miller.

Q. Except she had this building which you handled for her. And during 1943, when you returned from the service, during the rest of that year did you know what her husband's, Daniel Smith's, occupation was? A. No, sir.

Q. You did not know what his occupation was? A. No.

Q. Well, did you at some time after that learn what his occupation was? A. That is right.

Q. And approximately when did you first learn after your return from the Army what Mr. Smith's occupation was? A. I think it was in 1945. I believe it was 1945, sir.

Q. And, beginning with the end of 1945— A. Approximately toward the latter part of 1945.

Q. What was his occupation, to your knowledge? A. Well, he operated a news service room.

Q. News service? A. That is right, sir.

Q. Will you describe to the jury, or rather to his Honor and the jury, just what you mean by news service? A. All I know is a news service room, Mr. Miller.

Q. Were you ever in the news service room? A. No, sir.

Q. Never was in the place? A. That is right.

Q. And do you know what his occupation was in '46, 1946? A. News service.

Q. In '47? A. News service.

Q. '48? A. News service.

Q. And do you know of any other occupation that he had during '46, '7, '8? A. Not to my knowledge.

Q. You know of no other occupation? A. That is right, Mr. Miller.

Q. And some time in 1949 he ceased to operate the news service; is that correct? A. That is correct.

Q. Do you know when it was that he ceased to operate the news service? A. I believe it was in the early part of '49.

Q. Does it have any reference to the date when the Falmouth property was acquired? A. Oh, I don't know.

Q. Or the Surrey Room, so-called? A. I don't know.

Q. He ceased to operate, anyway? A. That's my impression.

Q. Mr. George, you prepared some of these returns, did you? A. I think so.

Q. Do you remember which ones you did? A. No, I don't.

Q. When you prepared them was it based upon information that was furnished to you? A. That is right.

Q. By whom? A. Mr. Smith and Mrs. Smith.

Q. Mr. and Mrs. Smith furnished you with the information, and as a result of the information they furnished you prepared the tax returns? A. Yes.

Q. You don't know which ones, though? A. No, I don't.

Q. Well, can you say whether you prepared the 1946 return (handing)? I show you the '46 return and allow you to look at it and see if you can tell from the return whether that was prepared by you? A. Yes.

Q. You say it was? A. That's right.

Q. You prepared the '47 return? A. That is right.

Q. The '48 return (handing)? A. Yes, I prepared that one, too.

Q. '49 (handing)? A. Yes, I prepared this one.

Q. Another one (handing). A. No, I did not prepare this one, to my knowledge.

Q. You know you did not prepare that one? A. No.

Q. O. K. I show you a photostat of the 1945 return (handing). A. No.

Mr. Miller: That is all. You may inquire.

Mr. Maguire: No questions.

Mr. Garrity: No questions. Thank you.

Mr. Miller: Springfield National Bank? (No response)
Springfield Institution for Savings? (No response) Mr.
Murano, please.

SYLVESTER M. MURANO, SWORN.

Direct Examination by Mr. Miller.

Q. What is your full name, sir? A. Sylvester M. Murano.

Q. Where do you live, Mr. Murano? A. Wallingford, Connecticut. My office is at 30 Congress Street, Meriden, Connecticut.

Q. What is your occupation? A. District Manager for the John Hancock Life Insurance Company.

Q. Now, some time in 1948 did you sell some so-called annuities to Daniel L. Smith or Eva F. Smith? A. I sold Eva F. Smith.

Q. Will you tell us the date that the transaction took place, when it was concluded? By concluded I mean when you received the payments. A. November 9, 1948.

Q. What occurred on November 9, 1948? A. I wrote Eva Frances Smith this annuity.

Q. How much was the annuity? A. Well, it was 50 units, that is \$5,000 a year.

Q. You mean the annuity called for a payment of \$5,000 a year? A. Yes.

Q. Who was the insured? A. Eva F. Smith.

Q. Who was the beneficiary? A. Daniel L., otherwise Janet Ruth Smith, the daughter.

Q. And does that mean that in the event the insured dies it goes to the beneficiaries; is that right? A. Yes.

Q. But otherwise these payments are made to the insured; is that correct? A. That is correct.

Q. Five thousand a year commencing when? A. November, the date of the annuity, November 9, 1948.

Q. You mean they commence— A. To pay them.

Q. —to pay them? A. Yes.

Q. How much was paid for the purchase of that annuity? A. On that particular one the first payment was \$10,243.80.

Q. When was that payment made? A. On November 9, 1948.

Q. And what other payments were made on that policy, and when? A. The second premium was paid of \$37,039.64 for the years 1949 through 1950, on April 2, 1949.

Q. Making the total payments during those two years of \$37,039.64; is that right? A. Yes, sir.

Q. Now you received payment of this annuity in the form of various checks; is that right. A. Yes, sir.

Q. And when you got those checks you put your rubber stamp on the reverse side? A. On the back.

Q. And deposited them; is that right. A. That is right.

Mr. Miller: Those checks have already gone into evidence. There is no need to dig them out at this time.

Q. You remember you were paid by those checks this total of the sum you have mentioned? A. That is right.

Q. Then did you write another annuity? A. I did.

Q. When was that policy taken? A. December 7, 1949.

Q. Who was the insured on that one? A. Eva F. Smith.

Q. What was the face value of that annuity? A. Well, it was in units of 43 units, which means, at \$100 per unit, \$4300 per year.

Q. You mean the benefit payments were 4300—A. Not the benefit payments.

Q. Annuity payments? A. Annuity payments.

Q. For how long? A. Oh, maybe 13 years; but only two years were paid on that.

Q. There was a beneficiary to that? A. The same Daniel Smith, otherwise Janet Ruth, a daughter.

Q. Daniel L. Smith—what did you say? A. Daniel L., husband, otherwise Janet Ruth Smith, daughter.

Q. In other words, you have alternate beneficiaries; is that right? A. Yes.

Q. The first is Daniel, then otherwise if he isn't eligible or around then it is the daughter; is that right? A. That is right.

Q. And what sum of money was paid to you for the purchase of this second annuity? A. Forty-three hundred dollars on the first one, and the following year another forty-three hundred—twice.

Q. No, wait a minate. Perhaps you don't understand the question. My question is how much money was paid by the insured for the purchase of this annuity? A. The first premium was for \$4,300. That was for the year of 1949.

Q. And that was paid when? A. It was received at the Meriden office February 9, 1950.

Q. What was the face value or rather the total premium

that was due on this policy? A. Well, there was only two premiums paid.

Q. Only two were paid? A. Yes.

Q. One in '49 for 4300? A. That's right; and one in '50 for 4300.

Mr. Maguire: I don't understand.

Mr. Miller: May we confer for just a moment?

(Short pause.)

Q. Mr. Murano, is it not a fact that on this latter annuity one payment was made, or rather the first payment of 4300 was made some time in the year 1950? A. Yes, February 9, 1950.

Q. A premium payment of \$4300 was paid to you in the form of a check which you endorsed and deposited; is that right? A. Well, our records here of the first payment in 1949 show it was paid in cash.

Q. Let me ask you this, Mr. Murano. Is it not a fact that for the first annuity to which you just testified there was a payment of \$37,039.64? A. That is right.

Q. And there was also paid on the second policy, No. 0203405 up to and including the year 1950, another \$4300, making total payments of premiums received by you on behalf of your company up to and including 1950 of \$41,339.64; is that correct? A. That's for both.

Q. For both? A. For both, yes.

Q. Is that correct for both? A. Well, it's thirty-seven and forty-three.

Q. Making a grand total of \$41,399 which was paid in the form of premiums? A. Well, similar to that.

Mr. Miller: Any questions?

Mr. Garrity: No questions.

Mr. Miller: Thank you, Mr. Murano. You are excused. Just sign up at the board.

The Witness: You don't need any of these books?

Mr. Miller: No, we don't.

Springfield National Bank and Springfield Institution for Savings, step forward.

WALTER A. BATES (condensed)

Witness is chief clerk of the Springfield National Bank; he has the signature card for savings account No. 115932 signed by John J. George and Eva Frances George; the account was opened on January 25, 1947 with a cash deposit of \$2,000; on June 3, 1947, there was a check drawn on Worcester, Mass. in the amount of \$3,000 deposited; balances on the following dates were as follows:

December 31, 1947	\$5,023.34
December 31, 1948	5,073.52
December 31, 1949	5,123.95
December 31, 1950	5,174.63

The signature card, ledger card and four tickets were admitted as Exhibit 21.

THEODORE H. HANCHETT (condensed)

Witness is assistant treasurer, Springfield Institution for Savings; according to the signature card, Eva Frances George and John J. George opened account No. 449491 on December 28, 1946 with a cash deposit of \$500; balances on the following dates were as follows:

December 31, 1946	\$ 500.00
December 31, 1947	4,513.33
December 31, 1948	564.04
December 31, 1949	575.37
December 31, 1950	586.93

On April 4, 1947, a check for \$1,000 was deposited; on June 2, 1947, a check for \$3,000 was deposited; on March 12, 1948,

a withdrawal of \$4,000 was made, the withdrawal slip being signed by John J. George, in the form of a check in that amount payable to John J. George and endorsed by him, Daniel L. Smith, and Paine, Webber, Jackson & Curtis. The signature card, ledger card and check were admitted as Exhibit 22.

JOHN P. McMAHON, Sworn.

Direct Examination by Mr. Miller

Q. What is your full name, sir? A. John P. McMahon.

Q. And where do you live, sir? A. 74 Beechwood Road, Wellesley, Mass.

Q. You are employed by the Treasury Department?
A. Yes, sir.

Q. Bureau of Internal Revenue? A. That is right; yes, sir.

Q. In what capacity? A. As Special Agent.

Q. Attached to what branch? A. The Intelligence Division.

Q. How long have you been so assigned? A. Since November, 1945.

Q. And what is your professional background and training? A. I have been trained as an accountant and had a certificate as a public accountant, in the State of Massachusetts.

Q. In other words, you are a certified public accountant?
A. Yes, I am.

Q. Now, some time during the latter part of 1949 was there assigned to you a case involving one Daniel L. Smith?
A. Yes, there was.

Q. And also Eva Smith? A. Daniel and Eva, that is right.

Q. And as a result of your receiving that case did you

send a letter to the derendant Daniel L. Smith? A. Yes, I did.

Q. And when was that letter sent out to him, approximately? A. In the fall of 1950.

Q. And did you have any talk with him shortly after the letter was sent out? A. No, I did not.

Q. Or a message from him? A. I had a reply stating that he was ill or—

Q. At some time thereafter did you hear from someone on his behalf with reference to this matter? A. Yes, I did.

Q. And from whom did you hear? A. I received a phone call from Mr. Delaney, William Delaney, stating that he had—Mr. Smith had gotten in touch with him with reference to his tax matter.

Q. Do you remember when it was that you had your talk with Mr. Delaney, approximately when? A. It was in October or November, I believe, 1950. I could confirm it.

Q. Some time in 1950? A. Late in 1950.

Q. You may look at your notes later if you wish.

And, in any event, after you had the talk with Mr. Delaney—And that is Mr. William J. Delaney, is that right? A. Yes, it is.

Q. Is he in the court room now? You can look. Is he in the court room now? A. Yes, he is.

Q. And you knew Mr. Delaney prior to this information? A. Yes, I did.

Q. And you knew him because he had worked in your department; is that correct? A. That is right.

Q. He had worked as a Special Agent in the Intelligence Unit? A. Yes.

Q. But at the time you received this communication from Mr. Delaney with reference to Mr. Smith, Mr. Delaney was no longer with the Department but was in private practice; is that correct? A. That is correct.

Q. And as a result of that talk did you at some later date have a conference with Mr. Delaney and with Mr. Smith?

A. Yes, I did.

Q. And was that the first conference that you had?

A. Some time in the spring of 1951. That is right.

Q. And can you tell us by looking at your diary and refreshing your memory, the date when that first conference took place? A. I believe there was a conference late in April of 1951, at which Mr. Smith and Mr. Delaney were present.

Q. You may look at your diary to refresh your memory as to the exact date. A. I do not have an entry on that date of April 30, but I believe that I have a memorandum somewhere. I do recall that late in April I had a conference with him.

Q. That was the only conference you had in which Mr. Smith was present? A. There was a subsequent conference in May.

Q. Well, let us take up the first conference, then. A. All right.

Q. Can you tell his Honor and the jury what occurred on that first conference?

Mr. Maguire: This does not go in against Eva Smith?

The Court: No, this is solely against the defendant Daniel, at this stage of the case.

Mr. Miller: All right.

Q. At that conference at which was present yourself, Mr. Delaney, and Mr. Smith—and I assume that was at your office? A. That is true.

Q. —tell us what occurred? A. Well, in a general way I went over Mr. Smith's background with the Union News Service, and what he had done prior to his association with that, and—

Mr. Garrity: Excuse me. Would you please keep your

voice up? A. --what Mr. Smith had done prior to his association with the Union News Service, its method of operation and to whom he furnished the service, and then his later investment in the Falmouth Bowling Club.

Q. These are the things that you asked. Did you get any answers from Mr. Smith? A. Yes, I did get answers.

Q. Well, what were his answers to the questions you put to him? A. He told me that he had managed the office for Union News Service, and that there were so many phones in that office,—

Q. So many what? A. Phones.

Q. Telephones, you mean? A. Telephones. And that each of the various clients for the Service would call those phones for the racing information. He listed about a dozen of such clients. And I brought up the matter of there being many more, possibly being more clients than he had given me, and he explained how it was possible that many others than paid for the service could get it, by leakage and things like that, who would not be paying clients. And I asked what records they kept in the business, as to how the cash was taken in and where it was banked. If possible I tried to ascertain the amounts, but I didn't get anywhere because he said Mr. Coan did all the collecting and that no records were kept, no bookkeeping records were kept in the service in view of the fact that the type of client that they had would not relish records being kept—I presume for possible incrimination.

Q. Well, not what you presume. Did you discuss with him what the clients were, who they were and what they were in your talking? A. Yes, I did.

Q. What did you say and what did he say, specifically? A. Well, I had a memorandum listing the various clients. I kept trying to find out if there were more than he had listed but it never got beyond about a dozen clients.

Q. Well, I mean did you discuss with him the occupation of his clients? A. Yes. The clients were bookies in the Worcester City area who had a need for the racing information furnished by the Union News Associates.

Q. Was there anything else you discussed with him that you haven't told us? A. No. In a general way I tried to ascertain just how—whether he had realized anything when he sold the business, or when he got out of it, and he told me that it was the type of business that you just got out of, and that you didn't sell—there was nothing to sell.

Q. Did you have any discussion or talk with him concerning the purchase of the Falmouth property, the so-called Falmouth Bowling Club? Just Yes or No. A. Yes.

Q. And what did you ask him with reference to the purchase of that building, how he purchased it? A. I asked him where he got the funds to invest in the Falmouth Bowling Club, or Night Club, or whatever it is, and he said it had come from moneys accumulated from the Union News Service or Associates. And I think I brought up the point were these amounts that he had reported on his tax return, and his answer was that some of the amounts were not reported.

Q. Did he tell you when it was that he took over this News Service? A. He said he had been—when Coan ran the Service he owned it, or whatever his relation to it was—Mr. Smith was manager, the office manager of the organization and then Coan died and there was an interval during the war when there was no need for racing information and then in late 1945 or '46 there was a need, the need for racing information arose again, and he felt it was an enterprise to which he could go since there was need of the information in that area.

Q. Did you have any talk with him concerning the amount of cash he had on hand in 1942 or 1943? A. Well, I did

bring up the point of whether he ever had much cash, but he said he had had—Coan had given him a few small presents, or something like that, in cash, but he didn't—no specific amount was given or anything like that.

The Court: Just keep your voice up. I can't hear you.

The Witness: Yes, sir.

Q. The substance of it was he said that Coan had given him a few small amounts in cash but he had no recollection—is that what I understand is the substance of it—or the exact amount, is that what you said? A. I didn't press him on the exact amount. I didn't feel he could supply it, nor did he mention any.

Q. Was anything else discussed on that first occasion, so far as you can recall? You may consult any notes you have. A. I have a memorandum.

Q. Do we have your memorandum? A. It must be there. [Witness leaves stand, obtains folder, returns to stand.] Excuse me, Mr. Miller. What was it that you were trying to get?

Q. I asked if you had exhausted your memory as to your talk with Mr. Smith on the occasion of this first conference, and whether in looking at your notes your memory was refreshed as to other subject matter you may have talked about. A. I asked him what he did between 1941 and 1945, and he answered that he had worked in a package store for about \$40 weekly, and I asked him how he managed to live on so small an amount. He said he was not a spender, that his wife had worked for a short time.

Q. Anything else that you recall asking him? A. I questioned him regarding the operations of Union Associates and its predecessor, the Mohawk A. C. Both had been located at the Bartlett Street building, 9 Bartlett Street. And he said he was the manager during the time Jim Coan owned the Service; and in that capacity he believed he had

functioned also as the treasurer, but he claimed no knowledge of the cash receipts which he said Coaa collected in his own way. Mr. Smith claimed he didn't know what amounts were collected, since in that business you don't ask questions like that. For the same reason he didn't know whether it was a corporation or not. Then he gave me an idea of how the fees ran in the Service.

Q. What did he say? A. His statement was about \$50 and up a week, depending on the size of the outfit serviced and whatever the traffic would bear.

He said his main job was to supervise the main office, pay the girls on the phones, and pay incidental bills, which were paid both by cash and by check, according to Mr. Smith. They didn't keep a check list of the organizations which they serviced because they knew mentally from whom they should collect. Mr. Smith claimed the number did not exceed twelve in all, and included some which I have named here. I don't know whether you wish them.

Q. I am not interested in the names, Mr. McMahon. A. Mr. Smith said he never got too familiar with the above persons, that is, the people whom they serviced.

It was then that I dwelt on how it was that many other smokesshops and poolrooms were serviced in the surrounding area. Mr. Smith claimed they were not serviced by the News Service; that some of the small operators managed to acquire the phone numbers of the paying clients and make the calls; in some cases the paying clients filtered the information down to others, and when the Service found out that the clients were supplying it in turn to others they would raise the price to the buyer.

Q. To the what? A. To that particular client. And then—

Q. This is all that Smith told you; is that right? A. That's right. This arose in the interview in April.

Mr. Smith said he took over the Service when a demand for it existed in 1946, since Mr. Coan had died in 1945.

The Court: He said all this before.

Mr. Miller: O. K.

Q. Just give us something you haven't given us before.

A. All right.

Q. Anything you haven't already told us.

The Court: We will take a short recess.

[Recess from 3 to 3:20 p.m.]

Q. Now, we were asking you, Mr. McMahon, if you had exhausted your memory as to the talk you had with Mr. Smith on that first conference in the latter part of April, 1951, and you are reading from your notes? A. Yes, sir.

Q. Some of the things you wrote you had already told us. Now, is there anything in your notes that refreshes your memory as to anything that was said that you have not already told us? A. I'm looking for that set of notes again. [A pause.]

The Court: Didn't you hear me ask you to look at those during the recess so we wouldn't have all these delays?

The Witness: No, sir, I did not.

The Court: I will have to rule that out. Go to something else.

Mr. Miller: O. K.

Q. There is a possibility that some of your answers were not heard, and I would like, if I may, to go over some of the important ones.

The Court: No, he has testified to them, and I am not going to hear them again.

Q. Did you have any talk with him about the activities of the Falmouth Bowling Club? Just Yes or No. A. Yes, I did.

Q. And whether or not he, in response to that question, told you about those activities there? A. He told me that

it was a restaurant, a night club type of organization that he ran for the Falmouth Bowling Club; that he not only had the ownership or an interest in the ownership of the organization but he managed the organization also, the night club there.

Q. Now, at some time later did you have a conference with Mr. Delaney in reference to this case? A. Yes, I did, on May 24, 1951.

Q. Was Mr. Smith present on that occasion? A. Yes.

Q. And did you talk to Mr. Smith? A. No, I wish to correct myself. I spoke with just Mr. Delaney. Mr. Smith was not there, as far as I can see.

Q. On or about June 13, 1951, did Mr. Delaney come into your office and hand you any so-called net worth statement? A. Yes, he did.

Q. And this net worth statement, was it signed by Daniel Smith [handing]? A. Yes, it was.

Q. And was dated the 12th of June? A. Yes.

Q. It was notarized? A. Notarized by Mr. George, I believe.

Q. And I show you this paper here and ask you if that is the so-called net worth paper that was delivered to you by Mr. Delaney on June 13, 1951, and which was signed by Daniel Smith? A. Yes, that is the statement.

Mr. Miller: Subject to our understanding, I am offering this in evidence now.

The Court: I can't admit it yet. I will take it under advisement. Mark it for identification.

[Net worth statement marked Government's Exhibit for identification.]

Q. Now, together with that statement did you receive a blank check? A. I did.

Q. From Mr. Delaney? A. Yes, I did.

Q. And to whom was the check payable? A. The check was payable to the Collector of Internal Revenue.

Q. And do you remember who the maker of the check was? A. I believe the maker was Daniel L. Smith. I would like to verify that.

The Court: I can't hear you.

The Witness: I am sorry, sir.

Q. I show you this photostat of the check, the original of which is no longer in your possession. Is that right?

A. That is right.

Q. And the amount of the check is how much? A. \$15,000.

Q. It is dated— A. June 12, 1951.

Q. And it is a cashier's check drawn on the Guaranty Bank & Trust Company? A. Treasurer's check drawn on the Guaranty Bank & Trust Company.

Q. It is payable to the Collector of Internal Revenue; is that right. A. That is right.

Q. Now, subsequent to the time that you received this statement and the check and as a result of the conference that you had in your office, did you return this check to Mr. Delaney? A. Yes, I did.

Q. Together with the letter? A. That's true.

Mr. Miller: That is all. You may inquire.

Cross-Examination by Mr. Garrity

X Q. Do you remember testifying about this same subject matter back in January of this year, Mr. McMahon?

A. Yes, I do.

X Q. On the occasion of a hearing on a motion to suppress evidence in this case? A. Yes, I do.

X Q. You remember that. Now, before we go into the matter of your testimony on that occasion, did you investigate the tax liabilities of this defendant in any way that

you have not already testified to? A. No, I did not make any other investigation of his tax liability.

X-Q. This case opened some time in October or November of 1950, according to your testimony on direct evidence.

A. My first contact with the taxpayer was in the fall of 1950; but I was assigned the case earlier than that, a few months earlier than that.

X-Q. Do you have any notations as to when the first contact, as you call it, with the taxpayer occurred? A. Yes, I do.

X-Q. When was that? A. On December 4, 1950, I sent a registered letter to Daniel L. Smith.

X-Q. And then Mr. Delaney contacted you shortly thereafter; that is right, isn't it? A. No, that is not correct. My next contact—

X-Q. Not what your next contact was. But it is true, as you testified to on direct examination, that Delaney got in touch with you shortly thereafter? A. Shortly thereafter, yes, that is right.

X-Q. That is all I am asking. Now, you saw Delaney on several subsequent occasions, did you not? A. Yes, I did. On the—

X-Q. How often did you see Delaney with reference to this case? A. I would say not more than four or five times subsequent to that.

X-Q. Do you keep records in your diary as to when you see an accountant or taxpayer? A. Yes, my regular routine is to do that. I can't vouch that every occasion will be noted.

X-Q. In the testimony that you just gave here you said, did you not, that you had this conference about which you have quoted with taxpayer as having occurred on the 30th of April; is that right? A. I believe that was the date.

X-Q. But isn't that what you just testified to? A. I did.

X-Q. I would like to show you your testimony given just a few months ago in this very court room. Do you recall testifying with reference to this conference as follows, in answer to my questions:

“Q. In connection with your investigation of this matter you had a conference with Mr. Delaney and with the taxpayer, is that true? A. 1951 there was a conference.

Q. Yes. A. Yes.

Q. Would it be approximately April 30, 1951? A. I could verify that, from my diary.

Q. Would you do that, please. A. exactly. It was not April 30.

Q. Would you please find that date. A. The date was May 24, 1951.”

Do you recall that testimony? A. I recall that.

X-Q. Have you entries in your diary now that cause you to change your testimony as to the date of that conference?

A. I don't have entries in my diary. It was on perusal of another memorandum. I was speaking from my diary at the time you asked me the question.

X-Q. If you would, please, sir, look at your diary now and find whether you have any entry under date of April 30?

A. I have entries, but not with reference to that conference.

X-Q. Would you turn to your diary for the 24th of May and see whether you have that conference reported on that occasion? A. Yes, I have a note indicating I saw Mr. Delaney on that date.

X-Q. How many times did you see the taxpayer? A. I believe I only saw the taxpayer once.

X-Q. Is there any doubt in your mind about that point? A. No, I don't think there's much doubt. I think there was confusion as to whether it was April 30 or May 24.

X-Q. Now, getting back to the investigation that you

conducted, do I understand that you saw Mr. Delaney on several occasions and the taxpayer on one occasion, and never did any investigating of this case over a six months' period of time except talking with the accountant; is that correct? A. No, that is not correct.

X Q. What did you do, sir, by way of investigating this case out and away from your office? A. I—

X Q. If anything. A. I visited—if anything? Yes, I visited Worcester and the Registry in Worcester County Court House to make a search of the Registry of Deeds.

X Q. When? A. I have a memorandum showing the record—or I have a work sheet in the record showing the exact date on that.

I may or may not have an entry in my diary on the same thing.

X Q. Have you your memorandam in this court room? A. I believe—

X Q. Can we get all together all your memorandums in this case with reference to this defendant? A. That might be difficult. They are scattered throughout various work papers.

X Q. Are they in this court room? A. I hope they are.

X Q. Have you got work papers on this table pertaining to some case other than this particular case? A. No, I do not.

X Q. Can't you tell us whether these are all of your memoranda? A. No, I cannot because they are scattered through as this one was, in other work papers, for the sake of consecutiveness in studying the case; therefore I couldn't say that I have them all here or all there or where they are.

X Q. Between 4 o'clock this afternoon and 10 o'clock tomorrow morning will you get together all your memoranda that is contained in the Government file of the case?

A. I will earmark them, yes.

X-Q. Will you assemble them so that you can use them in the matter of your testimony? A. I will certainly try to.

X-Q. All right. Now, look for the memorandum that you say you made on the trip to Worcester and tell me when did you go to Worcester? A. On October 17, 1950, I visited the Registry of Deeds for Worcester County in Worcester.

X-Q. When were you assigned the case in the first instance? A. I would have to look in my 1950 diary for that.

X-Q. Have you earmarked the points in your diary that pertain to this case? A. I had them clipped. I am not sure that all the clips have remained there. I was assigned the case October 13, 1950.

X-Q. What is the date you just gave as to when you went to Worcester? A. October 17.

X-Q. 1950. And this is the memorandum that you made, is it, on that occasion? A. That's my work sheet.

X-Q. Your work sheet? A. Yes.

X-Q. Let us see it. [Handed paper] Now, you did something else in connection with the investigation of this case out of the office in addition to your trip to Worcester? A. Yes. On that same date I visited the Assessors' Office over in the town of Shrewsbury to check into the taxpayer's real estate.

X-Q. And did you do something other than that out of the office in addition to this particular trip? A. No, I don't recall doing anything else outside the office on that day.

X-Q. Now, that was your complete investigation of this case other than your conversations with Mr. Delaney or with the taxpayer? A. That was my complete preliminary work in the case prior to assigning it to another agent.

X-Q. Now, I would like you to look in your diary and tell me what records, if any, you have of conferences that you had with Mr. Delaney other than the conference about

which you have already testified? A. My first contact with Mr. Delaney was on December 8, 1950, and he called me at 10:30 in the morning to advise that Mr. Smith had phoned him saying he had a letter from me. That is the letter I sent Mr. Smith. And he asked Mr. Delaney if he knew me, and Delaney told Smith that he did know of me.

X-Q. Is that in your diary? A. Yes, that is in the diary. Do you wish to see it?

X-Q. I certainly do. What else have you got? A. On this date?

X-Q. Yes, sir. A. There is that note for that day.

X-Q. Have you finished reading? A. I have not.

X-Q. Would you please finish reading it? A. [Reading]:

"Delaney to see Smith on Monday, then to call me on Tuesday a.m. regarding an appointment Tuesday or Thursday."

The appointment I asked Mr. Smith to show up was to stand at this time. That is the appointment I suggested to Mr. Smith in that letter which I sent.

X-Q. That's the first entry on December 8? A. That's the first contact with Mr. Delaney. That was a phone contact.

X-Q. Please turn to the next entry you have in that diary. A. I checked the State Probation office relative to any record that Mr. Smith might have had up there.

X-Q. And on what date was that? A. That was on December 12th.

X-Q. And what is the next entry that you have? A. On December 13, 1950, Mr. Delaney came in to see me regarding Daniel L. Smith.

X-Q. Yes. A. He had no power of attorney as yet, therefore there naturally couldn't be much discussion about it.

X-Q. Please, Mr. McMahon! I'm asking you just to read the entries in your diary. A. All right.

X-Q. I am not asking for your interpolation. What does your diary say, please? A. [Reading]: "No power of attorney as yet. Mr. Delaney to see Mr. Smith Monday for a long session. Delaney feeling out situation." I have made a point—

X-Q. Is there any entry in your diary? Are there any entries in your diary you have not read? A. I am still reading.

X-Q. Please do that. A. [Reading] "I made a point to the effect that Daniel Smith was wide of his actual gross. We wanted the details on the structure of Union Associates, and I told Delaney that Smith had thrown a load of cash into the Falmouth Club, and that the drug store angle was a minor one if it at all." Now, do you want me to go on to the next one?

X-Q. All I want is to get what you have written in your diary. Go on to your next one, yes. A. There is nothing else in 1950. This starts 1951. On January—this must be wrong. I have a note, I have it under January 14, on Sunday, but there's a shift in the page. I feel sure it's the 15th.

X-Q. What appears on that date? A. [Reading] "I phoned Mr. Delaney re Smith. He to phone tomorrow as to when he will see me." We hadn't got together at this point because—well, they weren't ready to do any talking.

X-Q. Please! I don't know whether you are reading or just stating it. Will you please stick to the entries in your diary? A. All right. Well, that is all on that date. I saw Mr. Delaney regarding Smith on January 16, and I made some notes in my folder concerning that. They will be in this folder, I believe. Do you want me to go back now to the notes in this folder?

X-Q. No, I do not. I would like you to read what you have got in your diary. A. Well, that is all on that date.

On March 14, 1951, I wrote up a memorandum on Smith that I had not seen Delaney. It's just a report—

X-Q. Is this your own memorandum? A. That's right.

X-Q. Are you reading something now with reference to Delaney or— A. No, I drafted a status report in my office on Smith on that particular day. I'm just giving you all the notes.

X-Q. Fine! Now, you continue. What's the next date? That date was what? The 14th? A. That was the 14th of March.

X-Q. The previous report? A. That's right. I took that report over to Mr. Sullivan.

X-Q. Who was he? James Sullivan? A. James Sullivan, that's right. At that time— Do you want me to give an explanation?

X-Q. No, I don't, Mr. McMahon.

Mr. Miller: Just what in the notes, just all the entries you have in your diary.

The Witness: All right. That's all there is on that date.

I called Mr. Delaney on March 20th.

“He said he would like to speak to me on Friday if possible. Figures shaping up. I to phone Thursday to advise if Friday O. K.”

X-Q. What is the next one? A. And on Thursday I phoned his office but there was no answer.

X-Q. What date is Thursday, please? A. What date is Thursday? March 22nd. March 28th is the next one. Mr. Delaney came over. He wanted to get a copy of the 1946 return, of which he didn't have a copy at the time.

X-Q. Excuse me. The diary doesn't say that, does it? Read what the diary says. A. [Reading]: “Come back

and get a copy of 1946 return." Many of these notes are so brief they might almost be unintelligible.

The Court: Let us decide that.

The Witness: Yes, sir.

The Court: Read the notes, nothing else. A. [Reading]:

"On April 2nd I saw Mr. Delaney, who said he to see Smith regarding figures today, then call me on an appointment to talk with Smith."

X-Q. What is the next one, please. A. April 11th:

"In the afternoon I saw Delaney re Smith. He copied 1944 and 1945 return, said Smith's wife in hospital and he wishes two weeks before coming in. I set 30th of April and he agreed. Advised that figures then ready. No cash at beginning. Taxpayer amazed at figures per Delaney."

I mentioned arrangements to Special Agent Sullivan, who was my supervisor on the work.

"I discussed sworn statement re ownership of business." That is Union Associates.

X-Q. Just read it loud enough so the jury can hear it as well as I can hear it. A. Do you wish me to repeat that?

X-Q. Yes, I would like you to read it so the alternate jurors can hear it. A. [Reading]:

"April 11, 1:30. Saw Delaney re Smith. He copied 1944 and 1945 returns; Said Smith's wife in hospital and he wishes two weeks before coming here. Said 30th of April and he agreed. Advise that figures then ready. No cash at beginning. Taxpayer amazed at figures per Delaney. I mentioned arrangement to Special Agent James Sullivan and discussed sworn statement regarding ownership of business."

X-Q. At this point I would like to interrupt a moment and ask you what you mean by the statement in your diary, "I mentioned this arrangement to Mr. Sullivan." What

arrangement did you have reference to? A. Well, I was making an arrangement with Mr. Delaney to see Mr. Smith on April 30th.

X-Q. Now will you please turn to your next entry?

A. [Reading]:

"May 16: Mr. Delaney called. Wants you to return his call. 2:15 William Delaney in to copy 1946 return."

May 23:

"Delaney phoned to say he and Smith to sit down on figures of net worth today. Will contact me as soon as complete."

"2 p.m."—

That's the May 24th date.

X-Q. Just read what you have. A. [Reading]:

"2 p.m. William Delaney with Smith net worth data. He figures \$28,000 plus tax and penalties and typed and signed copies submitted. I spoke to James Sullivan on that. No 870's."

The Court: I didn't hear that last.

The Witness: "No 870's."

X-Q. "870" means what? A. 870 is an agreement the taxpayer signed and he agrees with the results arrived at by the Internal Revenue Bureau as to his tax.

X-Q. You and I, Mr. McMahon, had signed in connection with another tax case a Form 870; isn't that correct?

A. You and I have?

X-Q. That is correct. A. I haven't signed it.

X-Q. I represented a taxpayer in a case which you have been the Special Agent in which a Form 870 was signed; isn't that correct? A. That is correct.

X-Q. Isn't it true: that a Form 870 is executed at the end of an investigation? A. That is, it is executed if the taxpayer agrees with the figure.

X-Q. And it is prepared, is it not, by the Treasury Agents for execution by the taxpayer? A. If they feel he will sign, yes.

X-Q. And—let me see this entry in your diary, please. A. Starting there [pointing].

X-Q. And you stated: "This figures \$28,000 plus tax and penalty." Is that correct? A. That's right. That refers to Mr. Delaney.

Mr. Miller: I can't hear your answer.

The Witness: That refers to Mr. Delaney when I say "he" in the diary.

X-Q. And this, of May 24, "Typed and signed copies to be submitted by May 29, 1951"? A. That is right.

X-Q. Typed and signed copies of what? A. That presumably would be the net worth data.

X-Q. The net worth statement; right? A. That's right.

X-Q. Which you discussed with him presumably on this occasion? A. No. He had come in with net worth data that was unsigned and showed that to me, and there was no discussion as to itemized figures.

X-Q. Did you see a statement similar to what was marked for identification by Mr. Miller, the U. S. Attorney? A. That's right.

Mr. Miller: Assistant U. S. Attorney.

Mr. Garrity: Assistant U. S. Attorney.

X-Q. Did he bring this statement in to you unsigned? A. There was a statement similar to that which showed me the results of the work he had done in lining up what the taxpayer's net worth was. That's right.

X-Q. What were the differences between the paper which he showed you and this paper, if you know? A. Well, I don't know whether there was differences. The only thing I could say was it might be the same one as he signed on

June 12. That is how little the figures were gone into at that time. There was no notation made as to—

X-Q. Just a moment. You don't have to give me an explanation.

Mr. Miller: Just answer the question.

X-Q. So that you say now that you got statements which were, or a statement which was at least so similar that you don't know of any difference between the one that is marked for identification and the one that was shown to you; is that your testimony? A. I am not saying that there was one so similar that I can't point out a difference. I made no notes that would enable me to determine the similarity or the difference.

X-Q. There isn't any doubt in your mind about the fact that you did see something similar? A. Similar as to appearance or as to figures?

X-Q. Let me ask you: In what connection was it similar? A. It was similar as to appearance. As to figures I couldn't answer you.

X-Q. Now, with reference to that point, do you recall your testimony a couple of months ago in this very court room? Well, I won't go into that right now. I withdraw that question, if I may. But I want you to further amplify this note, Mr. McMahon, "His figures \$28,000 plus tax and penalty." Do you see that entry in your diary? A. I do.

X-Q. What is the penalty you are talking about? A. Well, the only penalty that—I am not talking about that—

X-Q. What penalty? A. The one I am referring to is what Mr. Delaney is talking about. I am noting all the information conveyed to me by Mr. Delaney.

X-Q. And what is the penalty to which he had reference? A. Well, I say he had reference, without being certain, to the 50 per cent fraud penalty.

X-Q. Do you mean to tell me that you actually have

any doubt in your mind as to his having referred to the 50 per cent fraud penalty? A. Well, I think Mr. Delaney would have to answer that. I feel, without being certain, it is the 50 per cent fraud penalty.

X-Q. He had some conversation, did he not,— A. Yes.

X-Q. —with you concerning the fraud penalty? A. I made no tax computation. I couldn't say that was the fraud penalty. I could say with reasonable certainty it might be, but this is a computation of the taxpayer's representative.

X-Q. Did you have independently of any computation of the taxpayer's representative,—did you have any discussion with the accountant about the penalty of any kind? A. Well, I don't think it was ever discussed as such. You would have to ask him.

X-Q. I am asking you. A. I don't recall.

X-Q. Did you ever have any discussion? A. I don't recall any discussion about the penalty as such. Now you will have to find out from him why he computed it in there.

X-Q. Please don't try to tell me— A. I can say I had no discussion of the penalty as such with Mr. Delaney.

The Court: Why do you say "as such"? Did you have non-such?

The Witness: No, there was—let me say that I had no discussion of the penalty.

X-Q. That is, by you? A. By me.

X-Q. He discussed 28,000 tax and penalty? A. That's right.

X-Q. What did he say about the penalty? A. You don't want the exact words?

X-Q. I would like as far as you can recall his exact words. A. Well, my recollection of what he did about this penalty is this: that he had—

X-Q. No, what did he say?

The Court: The question is what did he say?

The Witness: Actually I can't recall what he said about the penalty.

X-Q. All right. A. If it was discussed at all.

X-Q. Now, you said he did keep a sheet; correct?
A. That's right.

X-Q. What was on the sheet? A. On that sheet was what I think is this computation of what the tax penalty was. He had made a computation.

X-Q. And on what type paper was that computation computed? A. Well, it was on rough—well, probably 8½ by 11 sheet or pad or something like that.

X-Q. It was one of these columnar sheets, was it not?
A. No.

X-Q. Accounting type paper? A. No, I am not sure it was even that. I know it was in rough form.

Mr. Garrity: May I please see Mr. Delaney's work papers which were exhibited during the course of discovery, and while you are thinking about it I will put another question.

X-Q. You testified, in answer to Mr. Miller's questioning about the conference you had with the taxpayer, just a short time ago, did you not, that he said to you that the clients were bookies in the Worcester City area? A. That's right.

X-Q. Do you recall testifying just a couple of months ago—

[Some papers were handed to Mr. Garrity.]

Mr. Garrity: Thank you.

X-Q. —in this same court room, sir, with reference to the identical conversation and the identical conference? In answer to my question did you answer, "No, he did not say bookies. He said to various organizations, but he did not say that they were bookies." Do you remember testify-

ing three months ago in this same court room to that effect?
A. I do recall that.

X-Q. And I want to see whether in your memorandum on this point you have got something in your memorandum on that particular question.

The Court: Look it up over night. We will adjourn now.

[Adjourned at 4 p.m. to 10 a.m., Wednesday, June 3, 1953.]

SECOND DAY

Court Room No. 1, Federal Building,
Boston, Massachusetts.
June 3, 1953, 10 a.m.

JOHN P. McMAHON, Resumed.

Cross-examination, continued

Mr. Miller: May we see your Honor for a moment?

(Conference at the bench.)

The Court: Go ahead.

X-Q. (By Mr. Garrity) Now, at the conclusion of yesterday's examination, Mr. McMahon, you were looking at a diary entry, as I recall, under date of May 24. Will you turn to that page? A. I am at the page now.

Mr. Garrity: I would like at this point to request once again those work sheets which were handed to me, Mr. Delaney's work sheets, be made available.

(Mr. Miller hands papers to Mr. Garrity.)

X-Q. And I had directed your attention to the following words "Have figures \$28,000 plus tax and penalties." Do you recall that? A. Yes, I recall that.

X-Q. Also "Typed and signed copies to be submitted by May 29, 1950." A. 1951.

X-Q. Excuse me, 1951. A. That's right.

X-Q. And as I recall you testified that you saw some paper on that occasion that looked like this net worth statement, so-called, but that you were not sure; is that an accurate statement of your testimony? A. I was not sure of the figures. I was sure of the appearance and general over-all setup.

X-Q. Don't you recall discussing with Mr. Delaney the change which was to be made in the figures contained in that exhibit for identification No. 20? A. No, I don't recall any discussion of a change which was to be made.

X-Q. May I point out in this exhibit for identification a page entitled "Exhibit 3 where living expenses are listed. Do you recall any change that was made in those figures as a result of a conversation you had with Mr. Delaney? A. I do not.

X-Q. Will you tell us that there was no change made or is it simply you have no recollection one way or the other? A. I have no recollection one way or the other.

X-Q. With reference to the type of penalty that was computed or that was referred to in this diary entry of May 24, do I understand that you didn't know what penalty Mr. Delaney was talking about? Was that the way you left it yesterday? A. No, I don't believe that was the way I left it yesterday.

X-Q. Let me ask the question all over again. You knew, did you not, that the penalty which had been computed by Mr. Delaney was a 50 per cent penalty? A. Yes, I would have known that.

X-Q. And that penalty is a fraud penalty, is it not? A. That is a fraud penalty.

X-Q. And that can be either a civil penalty or a criminal penalty? A. That is true.

X-Q. That penalty, as far as the figures in the penalty

are concerned, is a civil penalty; that is correct, is it not?

A. Well, it can be a penalty whether the case is disposed of criminally or civilly, but it is a 50 per cent penalty in either case.

X-Q. And you knew that at this time, on the 24th of May, that there was to be a 50 per cent penalty included in those figures; correct? A. Yes, if we could sustain the fraud, that would be so.

X-Q. Well, Mr. Delaney had already computed a total, had he not, which included the fraud penalty? A. That's exactly it. That is Mr. Delaney's computation.

X-Q. And that was submitted to you, was it not? A. That's true.

X-Q. And that amount was included in the \$28,000, was it not, rather than added to it? Do you remember that? A. No, I don't remember the totals that well, to answer the question that way.

X-Q. One other point. Mr. Delaney had left the government service a long time prior to the institution of this case in your office, had he not? A. That's true.

X-Q. In other words, he had no connection any longer with the government when he represented the taxpayers here? A. That's true.

X-Q. Prior to coming here this morning, in order to save the time of his Honor and the jury, with the cooperation of the Assistant U. S. Attorney we, meaning you and I and my associate, Mr. Miller, looked at the various memoranda which you had prepared in connection with this case? A. That's true.

X-Q. And where are those memoranda at the present time? A. I have them in front of me.

X-Q. And you exhibited certain memoranda to us but not others by agreement; is that true? A. That's true.

X-Q. And I ask you now, Mr. McMahon, whether or not

you made reports of any nature to your superiors in connection with this case at any time? A. Yes, I did.

X-Q. And I ask you first, you did, did you not, submit to them a so-called status report? A. That is correct.

X-Q. And subsequent to that time you submitted a report not called a status report but some other type of report? A. A memorandum.

X-Q. And what is the proper title for such a report? Do you call it a memorandum? A. A memorandum.

X-Q. All right; that is the second thing. Subsequent to the submission of the memorandum you wrote up on this case a third report, did you not? A. I don't recall writing a third report after that memorandum, no.

X-Q. Well, another report? A. No, I don't even recall another report being written.

X-Q. When you say you don't recall, do you mean, do you know you didn't or you can not recall one way or the other? A. I have no evidence of another report being written in my notes or otherwise.

X-Q. Forget your notes for just a moment, sir, will you, and can you tell me, do you remember that you did not or is it that you have no memory on the thing? A. I have no memory of writing another report subsequent to the one you are referring to.

X-Q. I am talking about the total number of reports, sir, that you wrote on this case. How many were there in total? We have already got the status report and the memorandum. Were there others, another? A. I have no recollection of others.

X-Q. Will you tell us that there were none? A. As far as I am concerned, there were none.

X-Q. All right. Now we have here this morning the memorandum, so-called, or the second report; is that cor-

rect? Is that what we saw? A. That's what you saw this morning.

X.Q. So the only thing we didn't see this morning, according to your testimony, is a so-called status report?

A. That is correct.

Mr. Garrity: And at this point, your Honor, I would ask that the witness be ordered to make that report available to counsel.

The Court: Any objection?

Mr. Miller: I have no objection unless there is contained in it confidential matter which does not relate to this line of inquiry.

The Court: All of that should be excluded. You may turn over the report but I don't want you to read a single thing to the jury—you know the type of thing—

Mr. Garrity: I certainly do.

X.Q. Now may I see that status report?

The Witness: Your Honor, there is other information in that report of a confidential nature. I am in a peculiar position—

Mr. Garrity: I would like, please, to have you make your explanation to his Honor at the bench.

Mr. Miller: May we come to the bench and let his Honor decide, perhaps?

Mr. Garrity: Certainly.

(Conference at the bench.)

X.Q. Now, coming, then, to the papers which we saw this morning, I ask you to refer to a memorandum in your file bearing the date May 24, 1951, the same date as you were speaking of in your diary. A. I have that memorandum.

X.Q. This tally contains, does it not, a computation of principal tax in the amount of \$18,000-odd and a penalty which is not totaled here but the combined total is \$28,000 so that the penalty would be 50 per cent; isn't that correct?

A. That is a correct—that is correct. But these are Mr. Delaney's figures.

X-Q. Who put them on the tape? A. I believe I put them on the tape when he showed me a summary of the figures—I have a note here "Delaney's computation" and I took the figures of tax he showed me and the penalty and since he didn't have a total, I ran this tape at the time.

X-Q. The entry in your diary there of course is \$28,000 including a penalty, should it not? A. It would be more correct. That is incorrect.

X-Q. That is incorrect? A. That's right.

X-Q. And you knew on the 24th of May that there was a tax and 50 per cent penalty computed on the basis of this net worth statement? A. Computed by Mr. Delaney.

X-Q. Coming now to this note "Typed and signed copies to be submitted by 5-29-51", and I think you testified that is typed and signed copies of this net worth statement? A. That's correct.

X-Q. And what conversation did you have with Delaney at that conference, if any, with reference to that particular date and with reference to that particular submission of the statement? A. From what I recollect, and referring to my notes, our conversation indicated that Mr. Delaney would have net worth figures typed and signed and ready by May 29th.

X-Q. Actually you didn't get it until the 14th of June, isn't that correct? A. Well, some time in, June 13th.

X-Q. 13th or 14th of June. And you expected it, according to this memorandum, by the 29th of May? A. Mr. Delaney stated that --

X-Q. Did you expect it by the 29th of May? A. I would expect it by that date.

X-Q. Prior to the 24th of May you have other memoranda here, do you not? A. I do.

X-Q. And this is dated May 23rd, the day prior, is it not? A. The day prior, that's right.

X-Q. And was not this memorandum a record in part of Delaney's report to you that Mr. Smith had been in on the previous day, namely the 22nd of May, and on the 23rd of May, to finish up the net worth statement? A. That is the result of a phone conversation. Delaney wasn't in the office, he called me and I made this note while talking to him on the 'phone.

X-Q. And that was part of the information which he furnished to you? A. That is correct.

X-Q. Now you have a previous entry in your file dated April 2nd, 1951 and this also is a memorandum of a 'phone conversation with Delaney; is that correct? A. That's correct.

X-Q. And it reports in part that Smith was coming in today, and that is April 2nd, to go over the figures with Mr. Delaney, according to Mr. Delaney's conversation with you? A. Into Mr. Delaney's office.

X-Q. Now, another memorandum is dated March 26, 1951 and this memorandum is a report of a conference with Delaney or a 'phone conversation, if you recall? A. I would say---this is a type of memorandum I made when I had a 'phone conversation, so I would say it was a 'phone conversation.

X-Q. So this memorandum in part says that---was a record of your conversation with Delaney to the effect that the figures were ready except for some adjustment of stock transactions to be cleared this week? A. That is what he told me.

X-Q. And also that he talked to Smith about an appointment early in the week of April 2nd? A. That's right.

X-Q. The case, therefore, in your mind was ready to be

closed; is that a fair statement? A. No, that is not a fair or correct statement.

X-Q. Did you tell Mr. Delaney on June 11 that the case would be closed in the usual way? A. I never told Mr. Delaney on any date anything like that.

X-Q. So that if there is an entry in Mr. Delaney's diary to the effect that you told him that, that is an incorrect entry? A. I would say it was incorrect.

X-Q. Do you recall, once again, your testimony in this very court room at the end of January of this year about this same subject matter? Do you not? A. I recall it, yes.

X-Q. And on that occasion there was considerable testimony regarding the circumstances surrounding the delivery to you on the 13th of June, 1951, that exhibit for identification together with a check for \$15,000? That was the figure--you remember all that talk? A. I recall that.

X-Q. And may I refresh your memory as to the days of the week involved by handing you a calendar for 1951 and directing your attention to the month of June?

Mr. Miller: Well, the diary has the days, anyway, hasn't it?

Mr. Garrity: Well, let me keep the calendar. You can keep the diary.

Q. Do you recall this testimony back in January:

Do you have anything with reference to June 11, which is a Monday? A. I do not.

Q. On June 11 do you remember Mr. Delaney coming to your office on the morning of that day? A. No, I do not. I have no notes to that effect and I do not not remember it.

Q. Now, do you remember his bringing a draft of

a net worth statement to you on the morning of that day? A. On June 11?

Q. Yes. A. I do not.

And also the following testimony on that same point, and I would ask you, please, Mr. McMahon, simply to listen to me at this point.

Q. Is this true, that so far as you can testify here this morning Mr. Delaney did in fact come to your office on that morning and did in fact present you with a copy of a net worth statement? A. No, that is not true. I have no notes to that effect.

Q. Whether you have an entry or not, I am asking you to go back in your mind. A. Yes.

Q. And have you any recollection of such a conference with Mr. Delaney? A. I do not have any recollection of that.

Then on page 11, my question:

Q. All right, now how about on a different date. Let me express the question in this fashion: Is it possible in your mind that Delaney did come to you on the 11th of June with a copy of this net worth statement? A. I can't see how it is possible. I have no recollection or notes.

Q. You can not recall one way or the other; is that correct? A. That is correct.

X-Q. So let's get back to that same week. Is this still your state of mind as to whether Delaney came to you on Monday, the 11th of June, with a net worth statement? A. No, it is not my state of mind at present, in the light of the memorandum that I have subsequently located.

X-Q. And when did you locate that memo, Mr. McMahon? A. Very recently, when I was going through files—my notes which had been assembled with other work papers on the case.

X-Q. So on Monday, the 11th, two days before you took the check and statement from Mr. Delaney, you knew, did you not, that he was---you knew the contents of that net worth statement and you knew that he was going to bring to you a check for \$15,000? A. I did not know for certain that he was going to do that. I think it was in his mind, however, to do that.

X-Q. You had a conversation with him, did you not, regarding the amount of the check that he was to bring to you? A. No. I had no conversation regarding the amount.

X-Q. So as far as you knew it might have been \$28,000, which is the total of the tax which you knew had been computed on the basis of that statement or it could have been \$2800; is that correct? A. I think---I believe that is correct. However---

X-Q. You say---excuse me.

Mr. Miller: Let him finish.

X-Q. Finish your statement. A. However, I do believe one of them had discussed at one time seeking to make a payment or voicing---or making a statement that the taxpayer would want to make a payment.

X-Q. Well, when we were here before you said, didn't you, and so far as I understand you say right now that you had no idea prior to the 13th of June as to what size of a check Mr. Delaney was going to bring two days thereafter? A. No. I wish to correct that.

X-Q. Please correct it. A. I am correcting it as to June 11, but I think on May 24th he was mentioning a payment of \$15,000 that he would like his taxpayer to make in connection with the case.

X-Q. Therefore on the 24th of May you had some talk about a payment, and I would like you now to tell his Honor and the jury all of the conversation with reference to a payment which you had, now, on the 24th of May, that you

can recall. A. The conversation comes back to June 11th---

X-Q. Well now, just a moment--- A. I'm sorry.

X-Q. You say now you had no conversation on the 24th?

A. No. I wish to correct it.

X-Q. That was the question, Mr. McMahon. A. I am mistaken as to the 24th.

X-Q. And now can you recall, was it a conference or a telephone conversation on the 11th of June? A. Well, the memorandum---

X-Q. Would you please answer--- A. I say from the memorandum it was a 'phone conversation but I would not bar the possibility that it was a visit to the office.

X-Q. Could it have been both?

Mr. Miller: He just said it could.

A. It could have been both, yes, or either.

X-Q. I don't say either, I said could it have been, not either one or the other, but could there have been, as far as you state now, both a conference and a 'phone conversation? A. It could have been, yes.

X-Q. Have you any memory, coming down again to the 11th of June, which you now can recall, some conversation with Mr. Delaney, can you recall your asking him on that date to have the statement notarized and signed? A. No, I can not recall that.

X-Q. Was there any conversation on that point? A. I can not recall any conversation on that point. However, I would volunteer this much---

X-Q. You don't have to volunteer; I am just asking you what you can remember. A. All right. I can not recall any conversation to that effect on that day.

X-Q. Delaney did say, though, on that day that he would get a check for \$15,000? A. That is right.

X-Q. Did you have any discussion with any of your superiors or associates in the Treasury Intelligence Office be-

tween the 11th of June and the 13th when Mr. Delaney brought that check over? A. No, I did not.

X-Q. With reference to that matter. A. No, I did not.

X-Q. You knew for two days, however, prior to the delivery of that check that it was forthcoming; that is true, is it not? A. No, that is not true. I knew he said it would be forthcoming.

X-Q. Well, if Mr. Delaney lived up to what he said to you, you were going to get a check for \$15,000 in two days? A. That is correct.

X-Q. And based upon the exhibit for identification which you have before you? A. That is true.

X-Q. And you knew the precise figures contained in that net worth statement, didn't you? A. I did not know the precise figures in the net worth statement because I made no effort to make a copy of that net worth statement in its incompleated form, in the form in which it was before it was filed.

X-Q. You saw it, however, several times, did you not? A. Well, seeing it and knowing actually what the figures were are two different things. I saw it, yes.

X-Q. Now I ask you, sir, to look at your diary for the 11th of June, 1951, and turn to that page in your diary--- A. I have that page.

X-Q. There is nothing there at all, is there, with reference to any 'phone conversation with Delaney or any conference with Delaney? A. There is not, but all my memoranda are not in the diary.

X-Q. On the 13th of June, which is a Wednesday, Mr. Delaney came to your office, did he not? A. That is true.

X-Q. And, again, do you have any note in your diary to that effect? A. Yes, I do have one for that date (indicating).

X-Q. The first note shows I was in there myself on that

date. On another occasion; is that right? A. That's right.

X-Q. And that Mr. Delaney came in subsequent to my own conference with you on that day? A. That is true.

Mr. Garrity: Excuse me; I would like to beg your Honor's indulgence for a moment while I read this. (Brief pause.) X-Q. Now, have you any other entry in your diary on the same week with reference to this case? A. No, I have not. Well, I have on the next day.

X-Q. May I see that? A. (Indicating.)

X-Q. You have seen that diary entry, have you not? A. Yes, I have.

X-Q. And refreshing your recollection now, Delaney came in with the net worth statement and the check for \$15,000; that is the first thing; is that right? A. That is right.

X-Q. What was the conversation you had with him at that time? A. I can not recall much of any conversation on that day, except he came to the office and turned over net worth statements and the check. I do not believe there was any prolonged conversation. It was almost that he just delivered the things and left.

X-Q. And on that occasion you looked at the net worth statement, did you not? A. I looked at it but made no notations as to exact figures or anything like that.

X-Q. And the check was handed to you at that time? A. Yes.

X-Q. With the net worth statement. And thereafter you brought the matter up to G. H. L., Mr. G. H. L.: is that your note? A. That is my note.

X-Q. And that is George H. Le May? A. That is true.

X-Q. Who at that time was your section chief? A. Group chief.

X-Q. Or group chief, and you had some conversation with Mr. Le May at that time? A. Yes, I did.

X-Q. Is Mr. Le May still in the same capacity now? A. He is not.

X-Q. And as a result of that conversation you returned the check to the accountant, Mr. Delaney, but kept on—but retained the net worth statement; is that true? A. Not as a result of that conversation only, no.

X-Q. Then as a result of that conversation and conversations with others in the Treasury Department, you returned the check and kept the net worth statement? A. That is correct.

X-Q. Now, that check which you returned was enclosed, was it not, with a letter dated June 14, 1951? A. That is true.

X-Q. And is that the original signature of yours on that letter? A. It is.

Mr. Garrity: I think you have seen this, Mr. Miller, this letter of June 14th.

Mr. Miller: I have no objection.

Mr. Garrity: I would like to have it marked.

(Letter dated June 14, 1951, signed by Witness McMahon, marked Defendant's Exhibit A.)

X-Q. One other memorandum I would like you to pull out of your papers there is a memorandum entitled "Time record". Do you see that at the back of your papers? A. Yes, I have it here.

X-Q. Is that time record a complete record of time that you spent in the course of your investigation of this case, so far as it is covered? A. It is an approximation. I wouldn't say it is exact. We were asked for a report on how much time we had spent on certain cases and in retrospect you could only approximate the time, and that is what this is.

X-Q. Well, your approximations during the year 1951, from January through the 11th of April, was a total of six hours; is that correct? A. That's correct, according to this approximation.

X-Q. During that conversation you told him, did you not, that you were sorry that the case had turned out this way and that you sent the check back to him? A. I may have said I was sorry but I do not recall ever saying that I was sorry the case turned out that way. I knew he felt badly about it and I said I was sorry.

X-Q. Now, about one month later on July 17 there was another conference with reference to this case, attended by both you and Mr. Delaney; is that right? A. That is right.

X-Q. Would you see if you can fix that date in your diary? A. I have July 17, but no notation as to that conference.

X-Q. Was it on some other day, so far as you can recall? A. I couldn't recall whether it was on another day or that.

X-Q. Well, in the course of that conference didn't you tell him once again that you were sorry that he got the impression of a voluntary disclosure? A. Yes, I believe I said that I was sorry he got the impression of a voluntary disclosure.

X-Q. And you were the only person in the Treasury that he had dealt with with reference to this case? A. So far as I know I was then, up to that point. I don't know who dealt with him after June 14th.

X-Q. I say up to the time you sent back that check if he got any impression, that was obtained from you? A. It would have been from me, if he got one.

X-Q. And you alone? A. That is true.

X-Q. And you remember on the occasion of this last conference, do you not, Mr. Delaney's saying to you, "If I had any doubt in my mind about the cases being closed on

the basis of the net worth statement I would not have had Mr. Smith sign it." Did he say that? A. I believe he said something to that effect. I don't know that is his exact words.

X-Q. In substance he said that? A. Yes, in substance.

X-Q. And it was after that you told him you were sorry? A. I told him I was sorry he got the impression. I didn't say just I was sorry.

X-Q. Now, let's come to your testimony yesterday afternoon with reference to this interview you had with the taxpayer and--excuse me--and the conference you had with Mr. Smith. That conference was arranged for a day or two prior to the 30th of June; was it not? A. No. I had been wanting to speak to Mr. Smith--from Mr. Smith back in October or December of 1950--but he was ill at the time and then subsequent to Delaney's coming into the case we never did get around to sitting down and talking until April.

X-Q. Well, there had been some talk, had there not, prior to the 30th of April as to whether there would be a stenographer for the government and an attorney on behalf of Mr. Smith present at that conference; is that true? A. No, that is not fully correct.

X-Q. Was there some talk prior to the 30th about whether or not Mr. Smith would give a formal statement, so-called, with a stenographer present or would give an informal statement? A. No. Prior to that time the only objection Mr. Delaney had or I wouldn't say it was an objection, the only point he raised was that he was reluctant to have Smith come into the office for an interview, considering the--I suppose the possible--

X-Q. Please stick to what Mr. Delaney said. A. He was reluctant to tell his taxpayer--his client--to come in for an interview.

X-Q. There was no stenographer at that conference, was there? A. There was none.

X-Q. And no attorney on behalf of the taxpayer? A. He was represented by Mr. Delaney.

X-Q. Well, Mr. Delaney is no attorney, is he? A. He was a representative authorized to represent him, as far as the Treasury was concerned.

X-Q. Was there an attorney on behalf of Smith at the conference? A. There was no attorney.

X-Q. And you never administered the oath in connection with it? A. I did not.

X-Q. It is usual, in Treasury procedure, is it not, that there be a stenographer present and an oath administered to the taxpayer in the course of an interview at your offices? A. It is usual under certain circumstances.

X-Q. Now, yesterday you testified first from your memory about what went on in that conference and then subsequently from a memorandum; is that true? A. That is true.

X-Q. Do you have the memorandum from which you started--which you used yesterday in front of you on the witness stand now? A. Yes, I do.

X-Q. It does not bear a date, does it? A. No, it does not, except in the body of the memo.

X-Q. The body of the memorandum, then, refers to the date of the conference; is that it? A. That is true.

X-Q. The memorandum itself is undated; that's correct, isn't it? A. That is correct.

X-Q. And I ask you when was it written? A. You asked me when?

X-Q. When. When did you write it? A. Are you asking me now?

X-Q. I am asking you right now, when did you write this

memorandum? A. I would say it was within a few days or maybe a week of the interview.

X-Q. A few days or a week. Would you say it could have been more than a week? A. It could have been. When there is no date I can't--

X-Q. I am talking about your memory now. Could it have been more than two weeks? A. It could have been.

X-Q. Could it have been more than three weeks, as far as your memory goes? A. As far as my memory goes I can't say whether it would have been more than three weeks.

X-Q. It may have been more or it may have been less? A. That is correct.

X-Q. I don't want to go from three weeks up to '52, Mr. McMahon, but can you state now is it possible that it was more or less than a month? A. I think it would have been less than a month.

X-Q. Maybe three weeks but not as long as four? A. Possibly.

X-Q. Or maybe a day or two? A. That's true.

X-Q. That would place the memorandum possibly, if it were written three weeks thereafter, in the middle of May, about the 18th or 19th of May; that's right, isn't it? A. It might be, yes.

X-Q. Now, this memorandum which you used to refresh your recollection is entitled a memorandum to the Special Agent in Charge; is that right? A. That is right.

X-Q. That was Mr. Kelliher? A. That's correct.

X-Q. If, yesterday afternoon, you testified in the course of direct examination to events that transpired at the occasion of this conference between you and the taxpayer and things that were said and if you find there a discrepancy between your testimony yesterday and what is in that memorandum, that memorandum of yours is the reliable record,

is it not? A. I would say it was the more reliable record, yes.

X-Q. And you endeavored, did you not, whether this memorandum was written three weeks or three years after the conference, to make a complete memorandum of what had transpired at that conference? A. Based on an outline I had made at the time, yes.

X-Q. And have you got that outline with you? A. I have the outline, yes.

X-Q. Now, the first point with reference to that memorandum is that it refers to the tax case of a Mr. Charles Smith; is that right? A. Yes. That is a mistake on my part.

X-Q. You had the case since December? A. Yes.

X-Q. For possibly as late as the 19th of May you were somewhat uncertain, were you, about his first name? A. No. I had a case in which there is a Charles Smith prior to that and I believe at the time I made the memorandum Charles struck me before Daniel did and I wrote Charles.

X-Q. With reference to that conference, Mr. McMahon, you didn't go into any detail on the assets which the taxpayer may have owned at the beginning of any particular period, did you? A. No, I didn't. I didn't go into that type of thing.

X-Q. And the general purpose of the interview was to get the method of operation and the background of the news service itself? A. Yes, and how they took in cash and things like that.

X-Q. Well, if you would answer the questions, please. You said all that yesterday. A. Yes.

X-Q. You testified yesterday that Smith told you a good deal about a syndicate of bookies in Worcester. A. No, he did not describe it as a syndicate. He told me of organiza-

tions in Worcester which both he and I presumed, realized were bookies.

X-Q. Excuse me? A. He referred to organizations in Worcester to whom he furnished the racing service and which at least I was of the opinion that we were both talking about bookies at the time.

X-Q. And you don't actually remember one way or the other, do you? In other words, isn't it only what you can see in that memorandum? A. Remember one way or the other about what particular point?

X-Q. Whether there is a discussion about bookies. Do you know whether they were talking about bookies in Worcester? A. Well, I don't think Mr. Smith mentioned them as bookies. He called them organizations. There was a discussion about that, yes.

X-Q. So that when you testified yesterday in answer to Mr. Miller's question "Well, I mean did you discuss with him the occupation of his clients?" Your answer, "Yes, the clients were bookies in the Worcester city area who had a need for racing information furnished by the Union News Associates" you would now change that testimony, would you not? A. No, I would not change it. Do you wish to go on at this point? I would say in my opinion he was talking about bookies and that is what my answer indicates.

X-Q. He didn't say anything about it? A. He didn't call them bookies, he called them organizations or customers, either way.

X-Q. He told you, did he not, he did not believe that there was any gambling or gambling syndicate in the City of Worcester? A. Near the end of our talk he said he did not believe there was an organized syndicate or much gambling in Worcester at all, I think that is the way he put it.

X-Q. He spoke about that not only at the time of your in-

interview but as of the time of his operation of the news service, didn't he? A. Well, my memorandum says---

X-Q. Not what your memorandum says. You can look at your memorandum to refresh your memory.

Mr. Garrity: Read the question, please.

(The question was read.)

A. No, we spoke only of it as of now, the memorandum of the interview, or the particular period, this year or that month.

X-Q. Now, you did give testimony yesterday with reference to his having received sums of money from a man by the name of James Coan; is that right? A. That is right.

X-Q. And he did tell you, did he not, that Coan gave him presents of money at various times prior to the years under investigation? A. During the time Mr. Coan was running the service, when I asked him to account for how he could live on the \$40, he said he got presents now and then from Mr. Coan.

X-Q. And do you know when Mr. Coan died? A. I believe he died in 1945. I have no accurate knowledge as to the date of his death.

X-Q. And he told you, did he not, that Coan had made him presents of money; isn't that what he said?

Mr. Miller: He said that yesterday.

A. I just said that in relation to how he would get along on his salary.

X-Q. Yesterday you testified, did you not, that he said, if this is an accurate quote of your testimony yesterday, Coan had given him a few small presents or something like that, in cash; do you remember stating that? A. I said that, yes.

X-Q. Look at your memorandum with reference to what he received from Mr. Coan. A. (Examining.)

X-Q. I'll look at it.

Mr. Miller: It might save time if you let him find it, Mr. Garrity.

Mr. Garrity: It might suit my purposes, Mr. Miller, if I find it.

The Court: Why don't you do these things outside of court?

Mr. Garrity: I won't take a minute, your Honor. I have got a note of the page back here somewhere.

X-Q. Isn't the only reference in your memorandum to that point as follows:

"Smith could not remember his cash position in '42-43 but hinted that Jim Coan had given him cash presents at times in previous years because of his help."

A. That is correct.

X-Q. That is the only reference in there, isn't it?

A. That is right.

X-Q. So when you characterized those gifts as a few small presents, that is your own addition two years or over a year after you wrote that memorandum, is it not?

A. That is my recollection when I was speaking, without the aid of the memorandum, yesterday; that is true.

X-Q. Yesterday you testified—

The Court: Mr. Garrity, you can't ask questions and read at the same time.

Mr. Garrity: I am almost through, your Honor.

X-Q. You testified on the basis of the memorandum which we have been talking about now which was written three days or three weeks thereafter; that's right, isn't it?

A. That's right.

X-Q. That memorandum was based, was it not, on a memorandum that you made contemporaneously with your interview with the taxpayer? A. An outline, yes, on which

I made notes here and there and some of it is recollection.

X-Q. I am referring to three pages stapled together and notes at the side and ask isn't this true, that you made these notes simultaneously with your interview? A. That is correct.

X-Q. With Mr. Smith. And it was this memorandum which is the basis of the later memorandum from which you testified yesterday? A. It is partly the basis plus what I recall that I have not noted here.

X-Q. But in so far as you had writings which were the basis of this memorandum, these are the writings?

A. Those are the writings, that is true.

Mr. Garrity: I would like to offer this in evidence.

Mr. Miller: No objection.

(Three-page memorandum by Witness McMahon marked Defendant's Exhibit B.)

X-Q. And when, for example, you testified yesterday that the charge for the news service was \$50 a week or more, that testimony was inconsistent, wasn't it, with your notation that the charge was \$100 to \$250 per month?

A. It is lower than the figure I noted here at the interview, but that would be in Mr. Smith's favor, as far as I can see.

X-Q. I ask you now what figure do you want to leave with the Court and jury, \$50 or more per week or \$100 to \$250 per month? A. I prefer to leave the figure on which I made a simultaneous note and which is the higher amount, \$100 to \$250 a month.

X-Q. Isn't that true, throughout this memorandum, wherever you do have a notation, it is a notation which represents as closely as possible the interview you had with the taxpayer? A. Wherever I have notes, yes.

Mr. Garrity: No farther questions.

Redirect Examination by Mr. Miller.

Q. These memoranda that you made in connection with this case, for what purpose did you make these notes?

A. Well, it was for the purpose of getting as close to an accurate story as possible of what transpired within my recollection and from my notes.

Q. And the memorandum that you prepared and to which we have just referred, are they verbatim or complete statements of all the facts that occurred? A. They are not verbatim but in my own opinion they are relatively complete, yes.

Q. And if you were to submit a report, would they include other facts that are in your notes or would they contain simply what is in the memorandum? A. They would contain simply what is in the memorandum. That is as complete a picture as I recollect it.

Mr. Miller: I guess that's all.

The Court: Next witness.

BENJAMIN ROMER, SWORN.

Direct examination by Mr. Miller:

Q. What is your full name, sir? A. Benjamin Romer.

Q. Where do you live? A. New York City.

Q. What is your occupation? A. Furrier.

Q. Are you in business for yourself? A. Yes, sir, corporation:

Q. What is the name of your company? A. Samilson-Romer Furs, Inc.

Q. Did you, in response to a summons, produce with you this morning certain books and records of your company concerning the sale of a fur coat which was shipped to Worcester on November 29 of 1949? A. I did.

Q. (Handing) I show you this paper and ask you if

that is the original invoice? A. That is a copy of the original invoice.

Q. Do you have the shipping ticket? Do you have it with you? A. Yes.

Q. Would you take it out? A. (Handing.)

Q. Looking at the original shipping ticket and looking at the original invoice, will you tell us what was shipped out, on what date and to whom by your company? A. This was merchandise which I sold to a Sol Harrison of Worcester, which was to be shipped to Eva Smith, c/o Railway Express, Worcester, Mass.

Q. And it was so shipped? A. Yes. Express No. 312186.

Q. Looking at the original invoice, is the name of the consignee there? A. Yes, Eva Smith.

Q. Will you read the address as it appears on the original invoice? A. This is a copy of the original. Eva G. Smith, 16 St. James Road, Shrewsbury, Mass., shipped c/o Railway Express, Worcester, Mass. Style D74880, one natural wild mink coat, \$800. TD 206, one natural ranch mink cape, \$950. Total, \$3,750.

Q. Were you paid for those items? A. I was paid, yes, sir.

Q. Do you recall the manner in which you were paid? A. A check was sent to me by Mr. Harrison made out by Smith.

Q. Which Smith? A. I don't remember the name. I would have to see the check.

Q. You don't remember the name? A. That's right. The last name was Smith.

Q. You received a check made out by someone named Smith, in the full amount? On what date did you receive the check? A. I deposited it December 5, 1949. It was received between the date of November 29, 1949 and December 5, 1949.

Mr. Miller: Are there any questions?

Mr. Garrity: I object to the admissibility of that testimony against my client, Daniel Smith. I want it limited to Eva.

The Court: You want it limited to whom?

Mr. Garrity: Eva G. Smith.

The Court: So limited at this moment.

Mr. Garrity: No questions.

Mr. Miller: You are excused; thank you very much.

The Court: Take a short recess here.

(Brief recess.)

RAYMOND J. HALLOWELL.

Direct Examination by Mr. Miller.

Q. What is your name, sir? A. Raymond J. Hallowell.

Q. Where do you live, please? A. Worcester.

Q. What is your occupation? A. I am Assistant Treasurer and Office Manager.

Q. Of what company? A. Fitz-Henry Cadillac-Chevrolet Company.

Q. In 1947 did you sell an automobile to Daniel L. Smith?
A. No, I did not.

Q. Did you deliver an automobile to Daniel L. Smith?
A. Not to my knowledge.

Q. Did I refer to July 12, 1947? July 12, 1947? A. I haven't got it---it is July 16, 1947.

Q. July 16, 1947, to whom did you sell an automobile?
A. To Eva George Smith.

Q. What address? A. 16 St. James Road, Shrewsbury.

Q. And that car was delivered? A. Yes, sir.

Q. Will you tell from your invoices the make of automobile and the price? A. The make is a 1947 Cadillac, Model 61, five-passenger sedan.

Q. What was the price? A. Price of \$2,978.

Q. And your records reflect if that was paid? A. It was paid.

Q. When? A. On July 15, 1947.

Q. Do you remember whether it was paid by check or cash? A. I have no definite record, sir.

Mr. Miller: That's all.

Cross-Examination by Mr. Garrity.

X-Q. Was there a trade-in on that at all? A. No, there were no trades.

Mr. Garrity: This witness, I understand, hasn't been sworn.

The Court: Can't we have less confusion here?

Mr. Garrity: I assumed he was one of that other group that were in at 10 o'clock.

The Court: Swear him in, Mr. Davis.

(The witness is sworn.)

The Court: Would you repeat that testimony you just gave under oath?

The Witness. Yes, sir.

The Court: That's all.

FRANCIS W. MADDIGAN, SWORN.

Direct Examination by Mr. Miller.

Q. What is your full name, sir? A. Francis W. Maddigan.

Q. Where do you live? A. 6 Ashmore Road, Worcester.

Q. What is your occupation? A. General contractor.

Q. Some time in 1948 did you do some work at 16 St. James Road in Shrewsbury? A. I did.

Q. With whom did you make the arrangements for performing this work? A. Mr. Smith, Mr. Daniel Smith.

Q. And as a result of some talk you had you agreed to do certain work; is that right? A. That's right.

Q. Will you tell his Honor and the jury in a general way what nature was the work you did undertake to perform?

A. Well, it was additions to his residence at 16 St. James Road, consisted of excavation, foundation, masonry and plaster and roof and finish carpentry work.

Q. Was some of this work let out to subcontractors, such as the electrical work? A. None that--not in connection with my work.

Q. Everything that you undertook to do, you performed yourself; is that right? A. That's right.

Q. Or through your own employees? A. That's right.

Q. Did you have a contract for this work? A. No.

Q. Can you tell from looking at your records the total amount of money received during the year 1948 on account of this work? A. Yes, sir. During 1948 I received a total of \$13,506.09.

Q. You received no payments during 1949, did you? A. No.

Q. And in 1950 did you receive a payment representing a balance due on the original contract? A. That's right, of \$2,300.

Q. So that you received the \$13,506.09 during 1948 on various instalments? A. That's right.

Q. And \$2350, was that one payment? A. That's right.

Q. Can you tell us who made the payments to you? A. Well, I received the payments from John G. George.

Q. All the payments were received by you from John George? A. All but the last one, \$2,300, and that was received by my attorney.

Q. Were these payments made by check? A. That's right.

Mr. Miller: That's all.

Cross-Examination by Mr. Garrity.

X-Q. Please, sir, looking at these checks, and I am showing you a check of September 16, 1948, \$7,065.99, payable to you; another check, October 27, 1948, \$2,983.84 payable to you; a third, November 30, 1948 in the amount of \$3,456.26, payable to you. A. That's right.

X-Q. Those are the checks in 1948 to which you have reference? A. That's right.

X-Q. Tell me this, with reference to that final check in 1950 in the amount of \$2,300, was that also signed by John J. George? A. That I don't know. That was received by my attorney.

X-Q. And you don't recall? A. I do not recall.

Mr. Garrity: I offer these.

(Checks payable to Witness Maddigan, dated September 16, 1948, \$7,065.99, dated October 27, 1948, \$2,983.84, November 30, 1948, \$3,456.26, marked Defendant's Exhibits K-1 through K-3.)

Mr. Miller: That's all; thank you, very much.

HELEN B. CRANE, SWORN.

Direct Examination by Mr. Miller.

Q. What is your full name? A. Helen B. Crane.

Q. Where do you live now? A. Sarasota, Florida.

Q. Did you formerly live in Falmouth, Mass.? A. I did.

Q. And your husband operated the Surrey Room there? A. Yes, sir.

Q. And it was so operated up until the time it was sold, is that correct? And do you remember the approximate date when it was sold? A. December, 1949, 14th or 15th, I am not sure which day it was.

Q. Did that Surrey Room that was sold, did that belong

to you and your husband or to your husband alone? A. It was---the land and building belonged to both of us.

Q. And you were present when the transaction was completed? A. Yes, sir.

Q. And what was the price for which the land and building and all that went with it was sold for? A. The total amount was \$75,000

Q. Of the \$75,000 did you and your husband receive a mortgage for \$40,000? A. Yes, sir.

Q. Covering part of the purchase price? A. Yes, sir.

Q. And then you received the difference of \$35,000 at the time? A. At intervals, yes.

Q. Well, the difference between the mortgage of forty and the seventy-five, thirty-five, did you not receive that amount of money at the time that the papers were passed?

A. We had received it when the papers were passed.

Q. You had received deposits? A. That's right.

Q. But what you had received up to the date of passing including what you received that day previous, was \$35,000; is that right? A. That's right.

Q. Can you tell, of the thirty-five thousand, how much of it was in the form of check or cash? A. No, I can't.

Q. Can you give us your best judgment as to how the money was received, whether it was all cash or all check?

A. It was not all cash.

Q. Was it all check? A. No, sir.

Q. Was there some cash? A. Yes, sir.

Q. Can you give us your best judgment as to how much of the \$35,000 was paid in the form of cash? A. No, I couldn't, sir.

Q. Was it over \$5,000?

Mr. Garrity: I object, your Honor.

The Court: She says she doesn't know.

A. I can not tell you, sir.

Q. Did you negotiate with anybody with reference to this matter before the actual passing of papers? A. Mr. Gediman, our attorney, and Mr. Daniel Smith.

Q. Did you have any conferences, you personally, with Mr. Smith prior to the time you passed papers? A. He agreed to sell, yes, sir.

Q. Agreed to sell, and agreeing on the terms? A. That's right.

Q. On how many occasions did you talk with him before? A. I don't know, sir.

Q. And the moneys that were received in the form of checks were deposited by you and your husband; is that correct? A. That is--yes.

Q. Was this known as the Falmouth Bowling Club when you sold it? A. Yes, sir.

Q. What is the Surrey Room? A. That is one of the rooms in the place, that is the dining room of it.

Q. When you owned it what sort of establishment was it? Mr. Garrity. I object.

The Court: What difference does it make?

The Witness: The same as it is today.

Mr. Miller: I will withdraw it.

The Witness: Except improvements.

Mr. Miller: Wait a minute.

The Court: No commercials here.

Mr. Garrity: No questions.

JAMES A. TAYLOR, SWORN.

Direct Examination by Mr. Miller.

Q. What is your full name? A. James A. Taylor.

Q. Where do you live? A. 7 Webster Place, Penacook, New Hampshire.

Q. What is your occupation? A. I operate a drug store.

Q. And the name of that drug store? A. Taylor's Drug Store.

Q. Is that an individual ownership or partnership?

A. It is a partnership.

Q. Who are the partners? A. Mrs. Eva G. Smith.

Q. Who else? A. And myself.

Q. When was the partnership formed? A. When?

Q. Yes, the approximate date. A. In 1943.

Q. And do you have the records showing the value of the partnership interest at the end of the calendar year of 1945? A. Well, I just have the books, sir. That's all we have of these records, is the yearly books.

Q. Well, let me ask you this, Mr. Taylor. You have filed tax returns, partnership returns, on this drug store?

Mr. Maguire: I think we can agree, Mr. Miller, that you may read the partnership returns as to the amount of Eva Smith's and Mr. Taylor's interest.

The Court: Why not do that?

Mr. Miller: I don't know whether the return will reflect assets. It will only reflect income.

Mr. Maguire: There is a balance sheet on it, Mr. Miller.

Q. Now, you don't have with you your original tax return, partnership return, for the year 1946? A. No, sir.

Q. Well, I show you this photostat and ask you to look at it and say whether or not that appears to be a true copy of the original that was filed by you? A. Yes.

Q. You can look at your signature. A. Yes.

Q. I ask you to look at the last page of the partnership return where it is stated, Partners capital accounts, A, meaning James A. Taylor, 4674.98; B, Eva George Smith, 16 St. James Road, Shrewsbury, 4674.98, and I ask you if that is the correct capital account of you and Mrs. Smith.

A. As far as I know it is.

Q. As far as you know that is correct.

Mr. Miller: I am not going to bother to put those on the board. I think if they go in the record it is sufficient, your Honor.

The Court: Yes.

Q. Now I show you a photostat---

The Court: Mr. Maguire said you might read those.

Mr. Maguire: If you will just read them, Mr. Miller---

Mr. Miller: I have read the amount and that is all I want.

Mr. Maguire: If you will read them in from each return.

The Court: What is the sense of having him identify them? He says you can read them.

Mr. Miller: All right.

Q. On the 1947 return it is reflected that the partnership capital accounts are \$4,015.28; is that correct? A. It must be.

Q. And for 1948 it is reflected that the partners capital account was \$2,741.07 for each partner; is that correct?

A. If that is the return, that must be so, sir.

Mr. Garrity: What date is that again?

Mr. Miller: This is the return for the year 1948, filed March 1, 1949.

Mr. Garrity: You are reading the figures at the end of 1947, though, aren't you? In other words, there are two figures on the return, one at the beginning and one at the end of the year?

Mr. Miller: This is the value of the partner's account and I assume it is at the end of the taxable year 1948. Unless I am mistaken. I am sorry. At the end of that taxable year the figure was \$2900.25; is that correct?

The Witness: To my knowledge it is.

Q. And for 1949 the value of the partner's interest in the

taxable year, at the end of the year, is stated as \$3256.82; is that correct? A. Yes, sir.

Q. And for 1950 it was \$3,087.88; is that correct? A. To the best of my knowledge those are correct.

Q. And you reported certain distribution of income on those returns; is that correct? A. Yes, sir.

Q. And the income that is reflected there is correct; is that so? A. To my knowledge, sir.

Q. Did you, during the years 1946, commencing January 1, 1946 through December 31, 1950, make any distribution of income or profits to Mrs. Smith? A. I think we did. A couple of years, but not the last two years.

Q. Can you tell from your books and records how much was made in each of those years? A. I don't know as I can.

Q. Would your books reflect that? A. I don't think so, sir. It was in cash.

Q. You have no records showing the exact amount of distribution made to her? A. No.

Q. Now, you know Daniel Smith, do you not? A. Yes, sir.

Q. And of course you know Mrs. Smith? A. Yes.

Q. Is she related to you? A. She is, through marriage.

Q. And did you have any talk with Daniel Smith some time in, or prior to, July 1st, 1949 with reference to his making an investment in the Valley Trust Company? A. I did with Eva, Mrs. Eva Smith.

Q. Did you have talk with Daniel Smith? A. No, sir. It was Eva.

Q. What was the conversation you had with Eva with reference to the Valley Trust Company? A. Well, I don't know exactly except the fact that they were starting a bank and needed capital and we were talking and I told her about it and she was interested.

Cross-Examination by Mr. Maguire.

X-Q. Mr. Taylor, could you say that you and Mrs. Smith are equal partners in the drug store? A. That's right.

Redirect Examination by Mr. Miller.

Q. You draw a salary, of course. A. I don't draw a salary; I take a drawing account. In a partnership you don't take salary.

Q. You don't divide equally? A. No.

Q. You are allowed a drawing account as a salary and then all above that is profits? A. Yes, sir.

Mr. Miller: That's all.

DONALD G. RAINIE, SWORN.

Direct Examination by Mr. Miller.

Q. What is your full name, sir? A. Donald G. Rainie.

Q. Where do you live, sir? A. 6 Holmes Street, Concord, New Hampshire.

Q. What is your occupation? A. I am an attorney.

Q. Are you connected with the Valley Trust Company? A. I am.

Q. In what capacity? A. Clerk.

Q. And when did you first become connected with the Valley Trust? A. Oh, it was in the latter part of 1948, the last few months of 1948.

Q. Practically from its inception, then? A. Practically.

Q. And you have brought with you certain certificates or, rather, stubs of original stock certificates from your certificate book and I direct your attention to Stock Certificate No. 40 issued on July 1, 1949, and will you tell us what your stub reflects on that date? A. One hundred shares issued Eva George Smith dated July 1, 1949. The base of this stub, received Certificate No. 40 for 100

shares this 25th day of July, 1949, signed Eva George Smith.

Q. Did you receive a check in payment of that certificate of 100 shares? A. I don't believe that it could be allocated in that way, sir.

Q. Let me ask you this, then: Were there other certificates issued on that same date? A. There were.

Q. There were four other certificates? A. That's correct.

Q. And they are numbered 41, 42, 43 and 44; is that correct? A. Correct.

Q. And they are each in the amount of 100 shares? A. One hundred shares.

Q. Making a total of five certificates representing 500 shares? A. Yes.

Q. Did that have a price or a par value? A. Of each share? The par value was \$50 per share.

Q. Is that what they were sold for? A. No, they were sold for \$60 a share. The New Hampshire statute required a 20 per cent additional amount in the initial issue for the purpose of creating surplus.

Q. Those 500 shares were all issued on the same date and they were all received, were they, the certificates by Eva George Smith? You have told us about the first certificate. Are the other four identical? A. Yes.

Q. Do your records reflect how the certificates were paid for? A. Our records in connection with these five certificates comprise simply a carbon copy of a letter addressed to B. W. Taunton, Assistant Trust Officer, National Shawmut Bank, Boston, Massachusetts.

Q. Was your company paid for these certificates? A. Under New Hampshire law the bank commissioner has to be satisfied that the necessary capital has been contributed before he will allow the bank to operate, and this time,

there was in effect an escrow agreement with the National Shawmut Bank of Boston so that—

Mr. Maguire: I don't mean to interrupt. I think we can agree there was \$30,000 paid for this stock by Eva Smith through the National Shawmut.

Mr. Miller: That's all I wanted.

Q. \$30,000 was received by the Valley Trust? A. That's right.

Q. Paid by Eva George, to whom the certificates were issued?

The Court: He has stipulated that.

Mr. Miller: O. K.; that's all.

Mr. Maguire: No questions.

Mr. Miller: If your Honor please, I have completed all the witnesses that I have available except that one might be complicated and I was wondering if we could recess now until two o'clock and see if we can shorten up the other one.

The Court: All right; recess until two o'clock.

(Recess.)

AFTERNOON SESSION.

Mr. Miller: May we see you at the bench?

(Conference at the bench.)

WALTER J. GAUTREAU, SWORN.

Direct Examination by Mr. Miller.

Q. What is your full name, sir? A. Walter J. Gautreau.

Q. You are employed by the brokerage firm of Paine, Webber, Jackson & Curtis; is that right? A. Yes.

Q. You have brought with you certain records concerning the customers' accounts of Eva George Smith and Danie. Smith; is that correct? A. Yes.

Mr. Miller: I might say to his Honor and to the jury at this point in order to expedite this case and this evidence, it has been agreed by counsel for the defendants that as of certain dates at the end of each year these two defendants, and we will specify each one, owned certain securities; that is to say that at the end of 1946 or 1947, and I will put the figures on the blackboard, the Paine, Webber records, if you went into them minutely and by detail, would indicate these were the holdings. From these stocks, records, they were owned, bought by Eva and sold during the fiscal year, and to avoid duplication we will give you the stocks that were owned by each of these two individuals as of the dates we are concerned with.

It is also agreed by counsel on behalf of the defendants that these stocks that were purchased were all purchased outright, not on margin, and that the method of paying for them varied; that it was either in the form of a cashier's check or a personal check or some other method. Some of the checks have already gone into evidence in connection with withdrawals from savings accounts, but whatever the amount of the value of the stocks, it is agreed they were all paid for in one form or another, the form of payment not being material.

But there is one other thing that I would prefer to offer in evidence and that is when the stocks were sold by Paine, Webber, Jackson & Curtis on the order of the customer, be it husband or wife, and they were sent a check from the brokerage firm representing payment from the proceeds of the sale and there are several checks that were sent out from the concern payable to Daniel Smith on his account and several checks were sent out to Eva Smith in payment of the sales of securities out of her account, I want to offer those particular checks in evidence showing that payments were made and how those checks were endorsed,

for whatever value they may be to you as members of the jury.

The Court: Why don't you mark them after the session?

Mr. Miller: We will call it Paine, Webber account and then give each defendant---(marking the blackboard).

The Court: Why don't you do the actual listing after we have adjourned?

Mr. Miller: You mean all the securities?

The Court: Yes.

Mr. Miller: We wouldn't have room on this blackboard.

Q. Now, Mr. Gautreau, according to your records you had two accounts, one in the name of Eva Smith and one in the name of Daniel Smith; is that correct? A. Yes.

Q. Can you tell me when the Eva Smith account was first opened?

Mr. Maguire: We agreed during the noon recess. Why don't we just read off these figures so Mr. Miller can put them on the board?

The Court: That is what I suggested.

Mr. Miller: He is just going to give me about six or eight figures.

The Court: Why don't you copy it from the paper.

The Witness: December 8, 1947 was the first one.

Q. There is nothing in 1945-6? A. Not on Eva.

Mr. Miller: What was the balance, Mr. Maguire, on Eva Smith on December 31, 1947?

Mr. Maguire: \$9,280.21.

Mr. Miller: And in 1948?

Mr. Maguire: \$37,602.57.

Mr. Miller: And 1949?

Mr. Maguire: \$35,673.79.

Mr. Miller: And 1950?

Mr. Maguire: \$23,727.22.

Mr. Miller: O. K. Now, Mr. Garrity, on Daniel---

Mr. Maguire: I have Daniel also.

Mr. Miller: The account in 1945?

Mr. Maguire: It starts in 1948.

Mr. Miller: Nothing in 1945-6 or '7?

Mr. Maguire: That's right.

Mr. Miller: What is the balance in December, 31, 1948?

Mr. Maguire: \$3,882.96. Same for 1949. None in 1950.

Mr. Miller: And that's it?

Mr. Maguire: That's it.

Q. Now, Mr. Gautreau, do you have with you the cancelled checks that were returned to your company on the account of Daniel Smith? Do you have them arranged there? A. (Handing)

Q. Would you read us the date of the first check?

A. July 26, 1944. You are not interested in that?

Q. No.

Mr. Maguire: We will be very glad to admit them and let Mr. Miller read them.

The Court: Go ahead.

Mr. Miller: I want to offer them in evidence.

Check dated April 30, 1948, payable to Daniel L. Smith.

June 29, 1950, check to Daniel Smith, \$1,893.13.

Check dated July 3, 1950, payable to Daniel Smith, \$1776.46.

Check dated April 8, 1949 payable to Eva George Smith, \$3,370.19, endorsed Eva George Smith, below that Daniel L. Smith.

April 14, 1949, check payable Eva George Smith, \$844.66, endorsed Eva George Smith; below that, Daniel L. Smith.

Check, January 12, 1951, payable to Eva George Smith,---

Mr. Garrity: Wait. What year is this?

Mr. Miller: January 12, 1951.

(Conference at the bench.)

Mr. Miller: This is offered for other purposes, your Honor.

The Court: I will allow it. The jury must disregard this because this is not—the year 1951 is not in issue on the income tax. It just shows payment to them.

Mr. Miller: This check is dated January 12, 1951 and it is in the amount of \$27,250.82, payable to Eva George Smith, endorsed Eva George Smith, and below that is the endorsement of Daniel L. Smith.

Check, March 16, 1948, Eva George Smith, \$38.75.

May 17, 1948, Eva George Smith, \$29.

January 12, 1949, Eva George Smith, \$20.

February 16, 1949, Eva George Smith, \$32.50.

April 8, 1949, Eva George Smith, \$36.65

July 21, 1949, Eva George Smith, \$5.34.

January 27, 1950, Eva George Smith, \$12,297.67, endorsed Eva George Smith.

And then a bank deposit.

February 10, 1950, Eva George Smith, \$1,884.83, endorsed Eva George Smith, for deposit to the Falmouth Bowling Club.

Check to Eva George Smith dated February 10, 1950, \$1,637.17, endorsed Eva George Smith, marked for deposit only, Falmouth Bowling Club.

Check dated February 15, 1950, Eva George Smith, \$1,677.86, endorsed Eva George Smith, deposit only, Falmouth Bowling Club, Elsie T. George, Treasurer.

(Checks by Paine, Webber, Jackson & Curtis to the defendants marked Government's Exhibits 25-A through 25-M.)

ALDEN GEORGE BIANCHI, SWORN.

Direct Examination by Mr. Miller.

Q. What is your full name, sir? A. Alden George Bianchi, 428 Shrewsbury Street, Worcester, contractor.

Q. By whom are you employed? A. C. V. Bianchi & Sons.

Q. Were you connected with that company in 1950? A. I was.

Q. Did your company do some work for Daniel L. Smith? A. We did.

Q. Where was the work done? A. St. James Road, Shrewsbury.

Q. What was the nature of the work? A. Rubber tile work.

Q. You have your books and records here? A. No, I haven't.

Q. Did you examine them before you came in? A. No, sir.

Q. Do you know of your own knowledge the amount of the contract price for the work? A. No, sir.

Q. Do you know whether your company was paid? A. It was.

Q. Do you know how much money was paid? A. That I don't know.

Q. Did you know at any other time previously? A. I did when we did the work. I was notified at 5:15 last night to appear.

Q. If I were to suggest the figure to you, would that refresh your memory as to the amount of payment you had received? A. I wouldn't want to commit myself that way because it is so long ago.

Q. Can you tell us whether it was over \$1,000? A. Yes, it was.

Q. Was it over \$2,000? A. I think it was.

Q. Was it under \$3,000?

The Court: This is guessing pretty much.

A. I don't know the figures so why should I commit myself?

Q. You know it was over \$2,000? A. I assume it was over \$2,000.

Q. I will accept that answer, then. And your company was paid? A. We were paid in full, yes, sir.

Mr. Miller: That's all. Any questions?

Mr. Garrity: No questions.

The Witness: Am I dismissed?

Mr. Miller: Yes.

The Witness: Thank you.

The Court: Mr. Foreman and Ladies and Gentlemen, we are going to adjour here until tomorrow morning at 10 o'clock. We hope to finish all the evidence tomorrow with arguments of counsel and I will charge you Friday morning on the law.

There is one important piece of paper here and that is this net worth statement which I am allowing to be entered in evidence. I probably should state that a written statement such as that which is obtained either as a result of promise of immunity or gain or one induced by fear or by threat in the Federal courts is not admissible as evidence. They are in some courts but not in the Federal courts.

From the state of the evidence here I can not rule as a matter of law that this paper was not voluntarily given by Smith but I think you can gather from the evidence and the cross-examination that has gone on up to now and probably from some future evidence that counsel will argue that Smith was induced to give this statement by reason of deceit or fraud.

As I said, I can't rule as a matter of law that such exists

but when you get this case you will have that very question as a question of fact to be decided on the evidence that you have heard on that point. So don't try to make up your minds about it now. Don't discuss it. Just keep your minds open until you have heard all the evidence.

You are excused now until 10 o'clock.

Mr. Maguire: Your Honor, that is admitted only against Daniel?

The Court: At the moment, yes.

Mr. Garrity: Also I would like the record to note my objection.

The Court: So noted. Ten o'clock tomorrow morning.
(Adjourned until 10 a.m., June 4, 1953.)

THIRD DAY.

Thursday, June 4, 1953.

Mr. Garrity. May I see you at the bench for a moment, your Honor?

(Conference at the bench between Court and counsel not taken.)

(Conference at the bench as follows:

Mr. Garrity: One of my objections to the admissibility in evidence at the conclusion of yesterday's hearing of the net worth statement is that the Court did not make a preliminary finding as to its admissibility.

The Court: What do you mean by that?

Mr. Garrity: By that, your Honor, I mean---in this case I argued, in the first place, that it is a violation of his Constitutional rights not allowing the motion to suppress and, second, that it is a confession and, therefore, your Honor should make a finding as to its voluntariness or involuntariness. And my position is that your Honor should not admit it until after having heard all the evidence on the point. And in this case, it appeared in our discussion in the lobby

that Mr. Delaney had been subpoenaed by the Government on the point, and at the conclusion of the first day's hearing Mr. Delaney was excused until this morning. I think it appeared, also, in the course of our conversations yesterday that I was bringing in Mr. Delaney to testify on the precise point, namely, the circumstances of the submission of the net worth statement. I would like to request, therefore, either that your Honor withdraw the net worth statement from evidence until such time as he has heard Mr. Delaney and has made an independent, has made his own, our own decision on the question of the admissibility, or in the absence of such a proving by your Honor I would like to insist or renew my motion to suppress the evidence and to object once again to the admission of it.

Mr. Miller: We are entitled, I say, to it now. He is not entitled to a preliminary hearing because it's not a confession. Having ruled it is not a confession, he is not entitled to a preliminary hearing—I mean, in the absence of the jury. If it was a question of confession—It's merely an admission against interest and, if, at the time it was offered it was admissible under the rules of evidence, and your Honor has so ruled, I think you ought to allow it. The facts will develop later. That would have some bearing on its probative force. That may be covered by appropriate instructions to the jury. It's only a confession that is to be heard by a Judge in the absence of a jury to determine the preliminary question of the fact as to the voluntary nature of it.

The Court: I thought you might want to waive it and let Delaney testify first to get rid of the possible exception.

Mr. Miller: That's all right with me. If you will put him on out of order? I'm not resting though.

The Court: You won't rest?

Mr. Miller: No, because I want to use that with my

revenue agent, because he is going to take certain facts out of that in determining real estate values and other factors.

The Court: Do you want to suspend now and put Delaney on?

Mr. Miller: If the jury is instructed that he is to be called as a witness for the defense, because he's not for me. I summonsed him but I'm not putting him on.

The Court: Let it stand as it is then. Your objection is noted.

End of conference at the bench.)

Mr. Miller: Is Mr. Toohey here?

(To Mr. Toohey.) Have you been sworn?

Mr. Toohey. I have.

JOHN F. TOOHEY, Sworn.

Direct Examination by Mr. Miller.

Q. What is your name? A. John F. Toohey.

Q. Where do you live? A. 40 Shepherd Avenue, Braintree, Massachusetts.

Q. What is your occupation? A. Internal Revenue Agent attached to the Intelligence Unit.

Q. Would you try to keep your voice up and repeat that? A. Internal Revenue Agent attached to the Intelligence Unit.

Q. And what do your duties as an Internal Revenue Agent consist of? A. Auditing income tax returns.

Q. Do you have any other duties, such as determination of tax liability? A. That is part of the duties we have, auditing the returns to determine the correct tax liability.

Q. Now in connection with this case against the defendants, did you have a conference or were you present at a conference at the offices of your department some time in July of 1951? A. July 17, 1951, a conference was called by

Special Agent Michael Cortese, at which I was present.

Q. Who else was present besides yourself and Special Agent Cortese? A. Michael Cortese, Daniel L. Smith, William Delaney and myself.

Q. At this conference or before the conference started with the taxpayer had you examined a net worth statement which had previously been submitted by Mr. Delaney on behalf of the taxpayer? A. I was assigned to the case July 13, and in between July 13 and the morning of this conference the work sheets held by Special Agent McMahon, who worked on the case previously, submitted his work sheets to me for whatever use I might find them necessary. I glanced at the net worth submitted and sworn to by Mr. Smith on or about that time. I made no examination of any item on that statement.

Q. But you looked over the items that appeared on the net worth statement? A. I did.

Q. And beyond that you conducted no investigation up to that point, is that correct? A. That's correct.

Q. Up until the time of the conference. So that at the time the conference took place you had seen and glanced through the net worth statement and certain other memoranda in connection with the case, is that right? A. That is right.

Q. At the conference the taxpayer was interrogated, is that correct? A. That is right.

Q. An interrogation was conducted by Mr. Cortese? A. Partly by Mr. Cortese and partly by myself.

Q. And in the course of this conference, consisting of the interrogation, you made certain notes, did you not? A. I did.

Q. Do you have those notes here? A. I have.

Q. And did you make the notes as the conference or interrogation was in progress? A. I did.

Q. And they were all made during that time and not thereafter? A. That is right.

Q. Now refreshing your memory from looking at the notes, can you tell us the questions that were asked? Incidentally, Mr. Delaney was present at this conference, was he not? A. He was.

Q. Will you tell us the first question that was asked of the taxpayer and identify the person asking it?

Mr. Maguire: May that be restricted as against Daniel?

The Court: It is limited to Daniel Smith and not to be used against Eva Smith.

A. I will read the notations.

Q. Do you have some memoranda? A. I don't have a memo on who asked the questions. I have the notations down here. It was assumed Mr. Cortese asked the first question. I have not his name on here.

Q. All right. Read the first question.

Mr. Garrity: I object on the ground I don't think it is clear whether the witness is testifying from his memory or reading from something he recorded at the time. If that is made clear I have no objection to it.

Mr. Miller: I asked him to look at his notes to refresh his memory. If you want him to read his notes and you have no objection, I would be willing to have him do that.

Mr. Garrity: If he is testifying from his memory, I will object to his reading from his notes.

The Witness: May I answer that?

The Court: You may use the notes to refresh your memory.

Q. You may glance at them to refresh your memory and then give your testimony. A. Cortese asked Delaney if there was any agreement with the Agent who opened the case and Delaney stated that there was an understanding that the case would be closed if a check were submitted

therefor; a check for \$15,000 was submitted but was refused.

In parentheses I have a notation dated 6/12/51 Treasurer's check, No. A32989, payable to the Collector of Internal Revenue, Boston, Mass., Guaranty Bank and Trust Company. Notation: Check was refused by the Office of the Special Agent in Charge, Boston, Mass.

The Court: Now wait a minute. What are you testifying to?

The Witness: I'm testifying as to the notes I put down on the day of the conference.

The Court: We want you to testify on what happened that day. You can use the notes to refresh your memory. What was the conversation?

The Witness: Yes, your Honor.

Q. Would you keep your voice up, please? A. John George, who prepared some of the returns, is a lawyer and brother of Mrs. Eva Smith, stated that he paid---

Mr. Garrity: I object. A. (Continuing)---him---

The Court: Just a minute.

Mr. Garrity: I object. He is reading right from his notes.

The Court: Can't you look at your notes and testify as to what happened? Don't read your notes, because that is not evidence.

Mr. Miller: I can ask him the questions and I will hold the notes.

The Witness: That's better.

Q. Did you have some talk with Daniel L. Smith with reference to the preparation of his tax returns? A. I did.

Q. And what did he say with reference to that? A. He said that he paid \$5 to John J. George to prepare his returns.

Q. Was M. Smith asked by Mr. Cortese whether or not

any books and records were kept in connection with the business that he operated?

Mr. Garrity: I object.

The Court: You are asking him a leading question.

Mr. Miller: Withdraw the question.

Q. Did Mr. Cortese ask of the defendant anything with books and records? A. He did. He asked him what books and records he kept.

Q. And what was the answer given by Mr. Smith?

A. That in view of the type of business that he operated, he could not keep any books and records, because it would get certain customers into trouble.

Q. And was any inquiry made as to the sale of the racing or news service when he sold out? Was inquiry made concerning the disposition of that business? A. There was.

Q. What was the question and what was the answer?

A. That that type of business was not sold.

Q. Now after that did Mr. Cortese ask him any other questions concerning his business or books and records that you recall? A. Not that I recall. I made no notes of any further questions that he asked, believing it was not pertinent to the information I needed.

Q. Did you then start asking some questions? A. I did.

Q. And what did you ask him about? A. I asked him certain questions relative to properties, which was necessary for me to establish to find out if the figures he had submitted in the statement were true and correct.

Mr. Garrity: I move that the last portion of that answer be stricken.

The Court: That may be stricken.

Mr. Miller:—May we have the stenographer read that portion which is allowed to stand?

(The previous answer is read.)

The Court: Just give us the question.

(The previous question was read.)

Q. What did you ask him about? A. Real estate values and bank accounts.

Q. Now did you ask him about any specific pieces of real estate? A. I asked him about the property at William Street, at Falmouth, and the St. James Avenue.

Q. You may look at these notes to refresh your memory as to the questions you asked him concerning these pieces of real estate. What was the first piece of real estate you inquired about? A. 36 William Street.

Q. What did you ask him about that property? A. From whom he bought the property, how much he paid for it, what it consisted of.

Q. What did he tell you? A. He told me that the property was bought from Florence B. Morris, bought some time in 1939, cost \$12,000 of which the house was \$10,500 and the furniture \$1,500, that the property was sold in 1946 to an unknown party.

Q. Did you ask him how much he received for the sale of the house? A. I did. He stated that he received \$10,000.

Q. Now did you ask him any more questions concerning that particular piece of property? A. I did. I asked him if he used it for a personal residence, and he stated that it was used for a personal residence and partly rented the Falmouth house, that he received a rental of approximately \$40 a month.

Q. Did you ask him how the rents and expenses were handled? A. I did not.

Q. Did you ask him any other questions concerning that particular pieces of property? A. I did not.

Q. Did you then inquire about another piece of real estate? A. I inquired about the Bartlett Street property.

Q. And what did you ask him concerning the Bartlett Street property? A. How much he paid for it, if there was any mortgage on it and what it was used for.

Q. What did he tell you in response to those questions? A. He told me that 9 Bartlett Street--

Q. Keep your voice up. A. (Continuing) He told me that 9 Bartlett Street was bought some time in 1946, that he paid \$35,600 for the land and buildings, that he had a mortgage of \$34,000 on it, that the news service occupied the fourth floor office, and that George collects rents and paid expenses, also mortgaged notes.

Q. Did you question him about the amount of the mortgage payments? A. Not at that time.

Q. Well, did you question him at a later date? A. Not him at a later date; another individual.

Q. Did you ask him any other questions concerning this brick building at Bartlett Street? A. Not at that time, no.

Q. Did you inquire about any other real estate? A. 16 St. James Street.

Q. And what did you ask him about that property? A. The type of property, number of rooms, furniture.

Q. Did you ask him what he paid for it? A. I did.

Q. What did he tell you with reference to the questions that you asked him? A. He stated that there were seven rooms, new furniture, single house, cost \$9,600, paid \$1,000, which was returned to cover the repairs to be made but never paid out; bought from Lucy, mortgage was to Co-Operative Bank, about \$8,000; actual equity about \$1,000 cash; no mortgage on it now; does not know when paid; bought direct from owner.

Q. Did you ask him anything else about that property? A. Not that property.

Q. Did you ask him about any other property? A. The summer residence.

Q. What did you ask him about that property? A. As to the cost and any encumbrances on it.

Q. Did you ask him when he acquired it? A. He volunteered the information.

Q. Well, what did he say when he volunteered it, if you recall? A. Summer residence, West, owner; bought 1948, \$15,000 cash; no mortgage; bought furniture, approximately \$2,000.

Q. Did you ask him any other questions about that property? A. No, sir.

Q. Was there any other property you interrogated him about, any real estate? A. Club at Falmouth---

Q. All right. A. (Continuing)--which included real estate.

Q. You asked him about the Club at Falmouth. Was real real estate and building listed for Falmouth on the net statement? A. On the net worth statement submitted: "Building, Falmouth Bowling Club, Inc." is the way it was listed.

Q. What is the amount for which it was listed? A. \$75,000.

Q. Under "Assets" how is it listed? I mean what is the description under the column of "Assets"? How is it described on the net worth statement? A. Building, Falmouth Bowling Club, Inc.

Q. \$75,000? A. \$75,000.

Q. And on his schedule of Liabilities, is the mortgage shown there? I'm asking you now to look at the net worth statement as submitted by him, his net worth statement. A. No,—oh, yes. Under the year "1948" he lists "Mortgage, Falmouth Bowling Club Building, \$40,000."

Q. Then you interrogated him concerning this property, is that correct? A. I did.

Q. What did you ask him, and let us have one question

and one answer at a time? What did you first ask him?

A. From whom he bought the property.

Q. What was his answer? A. Lester Crane.

Q. Then what did you ask him? A. The cost.

Q. What was his answer? A. \$75,000, \$35,000---cash or checks, and in addition he added top soil was sold to Turner---

Q. Brevocal? A. (Continuing)---Brevocal, and deducted same from bid.

Q. Bid on what? A. I didn't list it on my note at that time. That is something I developed at a later date of what that bid applied to.

Q. Well, do you know as a result of your investigation that was on the hot topping? A. That is right.

Q. And he received some money for the soil which was applied toward the amount to be paid for hot topping the parking lot, is that correct? A. That is correct.

Q. Did you ask him any more questions concerning the Club? A. Yes. I asked him about the \$40,000 mortgage. He said he took back a \$40,000 mortgage---additions made by the corporation not by taxpayer, leased to the Club, five-year lease, Falmouth Bowling Club, Inc., John George, President, brother-in-law; Elsie George, Treasurer, sister-in-law; Eva G. Smith, Clerk, wife; no stock issued; taxpayer not an officer; books kept by Daniel L. Smith.

Mr. Maguire: Excuse me. I renew my objection. I wish the witness would not testify by reading directly from his notes.

Q. What did he tell you with reference to the ownership of this Club? A. As owner of the Club he gave me a list of the officers and as to whether there was stock involved, as to whether he was an officer.

Q. What did he say with reference to that? A. He said that he kept the books of the organization, that he held

no office, and he listed as officers: John J. George, President, Elsie G. George, Treasurer, Eva G. Smith as Clerk, and then he gave me a list of people, the corporations or organizations that did work on the Club.

Q. Well, did you ask him about the issuance of any stock in this corporation? A. I did.

Q. What did he say? A. He stated there was no stock issued.

Q. Did you inquire of him as to who kept the books? A. I did. He said that he did, Daniel L. Smith.

Q. Did you ask him about certain alterations or improvements that were made to this property? A. I did.

Q. What did he tell you, in a general way? A. He gave me a number of names. I'd say roughly 8 or 9 names of firms with whom he had contracted to make renovations and improvements on the property.

Q. Those are the people from Falmouth in the main who testified yesterday, is that correct? A. That is correct.

Q. Was there any talk or discussion with reference to the purchase of an extra lot of land to be used as a parking lot, so far as you can recall? A. Not at that time, no.

Q. Well, did you subsequently ascertain that a lot of land was acquired for the use of an additional parking lot? A. I did.

Q. Do you know what the price was that was paid for that additional lot of land? A. \$4,500.

Q. \$4,500. That lot of land is land on which the topping was done by the witness who testified yesterday? A. That is right.

Q. Did you ask him about the management of the Club there, as to who ran the Club and managed it? A. I did.

Q. What was his answer? A. He mentioned the name of John J. Smith as being manager and also that the help

looked to either John J. Smith or himself for direction as to duties, I believe it was.

Q. Did you ask him about his wife's connection with the business? Withdraw the question. Was any statement made by him either in response to a question or volunteered by him with reference to his wife's connection or interest in the Falmouth Bowling Club?

Mr. Maguire: May I again ask that--

The Court: This is limited to Smith, himself, not establishing the fact as against the wife.

Q. Then did you go into a discussion with him with reference to the Paine, Webber, Jackson & Curtis stock brokerage account? A. I did.

Q. What did you ask him? A. Without reference to my notes, I have forgotten just what questions.

Q. I will allow you to look at them if they will refresh your memory (handing papers to the witness). A. I asked him in respect to the balances in his brokerage account, and he stated that he carried no balances, that he would get checks for payment and would cash those checks.

Q. Did you ask him anything else about the brokerage account? A. May I refer to my notes again?

Q. Yes. I want the entire conversation between you and Smith with reference to the Paine, Webber account. Have you given it to us in its entirety or was there anything you may have omitted? A. Only to the extent that he made the statement that cash was used.

Q. Now did you ask him about any other assets? A. I did.

Q. What else did you ask him? A. In reference to the Worcester Co-Operative Bank account.

Q. And what did he tell you with reference to that? A. There was one item in the net worth that indicated a

decrease, and I asked him why that happened. He stated that probably that money was used partly to pay off on the purchase of the Falmouth Bowling Club.

Q. Were there any other questions you asked him? A. In regard to insurance, life insurance or any kind of insurance he might have of a like nature. He mentioned the only insurance that he could remember was a \$1,500 policy on his life; that he had no Government insurance or other insurance.

Q. Then you asked him some questions about his physical condition? A. That is right.

Q. What did you ask him and what did he say? Look at the notes to refresh your memory. A. At that time he was asked—I'm not sure whether it was asked by Michael Cortese or myself—in regard to his physical condition, but I made notes in respect to it at the time.

Q. Are there some notes in your memorandum with respect to his physical condition? A. I did make notes with respect to his physical condition as stated by him at that time, but as to whether I asked the question or—

Q. Regardless of who asked the question, he was asked either by you or by Cortese some question or questions concerning his physical condition and health, is that correct? A. That is correct.

Mr. Garrity: I object, your Honor.

The Court: Well, it is pretty leading. Mr. Witness, tell us what Smith said. We don't care who asked the questions. Tell us what he said to you about his health.

Mr. Garrity: I object to its relevancy.

Mr. Miller: I don't need it. It's in here.

Q. Now after this interview was over you subsequently started an investigation in connection with this case, is that correct? A. That is correct.

Q. And your investigation consisted, among other

things, of determining whether or not all these assets that were listed on the net worth statement---

Mr. Maguire: May we find out what Mr. Toohey did rather than have Mr. Miller recite what he did?

Q. What did you do after the interview in connection with your investigation of this case? A. After the interview Special Agent Cortese and myself got together and determined how we would proceed to examine the items on this net worth statement to determine the correctness of it.

Q. In consequence of that conference was an investigation conducted? A. An investigation was conducted in detail.

Q. And did you participate in that investigation? A. I did.

Q. The results of that investigation were reflected by the testimony of the witnesses that we have heard for the two previous days, is that correct? A. That is correct.

Q. Did you subsequently set up and prepare a net worth statement of your own of the taxpayer's assets and liabilities and net worth based upon your investigation? A. I did.

Mr. Maguire: If your Honor please, would you hear me at the bench?

The Court: Yes.

(Conference at the bench between Court and counsel, not taken.)

The Court: I am going to excuse the jury for about ten minutes.

(The jury leaves the Courtroom at 10:40 a.m.)

Mr. Maguire: If your Honor please, at the outset I would like to say, first, this is a highly unusual case. First of all, as far as I know, your Honor, it is the first net worth tax case that has been tried in this District. Secondly, as

far as I know, in all cases that we have examined, and there have been many, it is the first time I have ever known of a husband and wife to be indicted jointly for tax evasion. And finally, and this is the one I want to direct my remarks to, your Honor, the Government in this case is proceeding on a joint theory. In other words, they make no effort whatsoever to break down the answers as between one and the other.

The two defendants here have been indicted under 145(b) in five counts. They have been indicted jointly.

It's a matter, I think, as far as criminal law is concerned, it's very clear, and I have cited cases in my brief, that an indictment, although it is in form joint; in fact and in operation, it's separate, and that means in effect that the Government has the burden of proving the elements of the crime against each defendant individually. Now it could well be, if your Honor please, that in this case they could prove the elements of tax evasion against Daniel or against Eva and then perhaps show knowledge in the other party of what Daniel did, but the point of the matter is they do have to prove those elements against one or the other.

Now the elements of the tax evasion, if your Honor please; I would like to read briefly, if I may, from a case cited on page 1 of the book, and it states--this is the quote from it: " . . . the right of every defendant to stand or fall with the proof of the charge made against him, not against somebody else The defendant had a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else."

Now in this particular case, your Honor, there are three elements of the Government's burden: the attempt to

defeat or evade; willfulness; and they have to show that an additional tax is owing.

On that third element the Government is endeavoring to show that on a net worth theory, which means it is purely circumstantial evidence, and on that point I may say that in order to satisfy their burden on that score they have two conditions to meet: first, they have to show a source. Now I have cited in the other memorandum I have given you cases of how the Government is prepared to do that. The second thing they have to establish is a fixed starting point with reasonable certainty so as to exclude every reasonable hypothesis of innocence, and by "innocence" in this case it's from prior accumulated funds, inheritance, and so forth.

Now we come down to this particular case. The Government in effect has not made and is not going to make apparently any effort to prove what I might call the corpus delicti against either of these two defendants. They have introduced this testimony and, as Mr. Miller has said in his brief which he submitted some time back, as far as the Government is concerned it was immaterial as to whether the assets were Daniel's or Eva's. And I say to your Honor that the Government, as far as their burden of proof is concerned, have failed and that is fatal to their case.

In other words, they have got to prove that Dan is an evader or they have to prove that Eva is an evader, and they are not attempting to tackle it on that basis.

Now the Agent who is here is going to testify, and of course we have a copy through discovery, it was a joint net worth statement. He makes no breakdown. He just lumps the two together, with no regard as to what belongs to Eva or what belongs to Dan.

The Court: Does the net worth statement purport to be joint?

Mr. Maguire: It does, your Honor, and, as a matter of fact, the net worth statement that we have had the controversy about also purports to be joint. That is the one that Dan signed. Now, if your Honor please, the only possible explanation that I can give you for what I believe definitely to be the mistaken theory of the Government's case is this provision in the Code, Section 51(b), and, if I may be permitted, I think by giving you a short history of that Section and the cases decided under it, I think it clear that that has no application whatsoever to a criminal proceeding.

Now, as you have noted in front of you, your Honor, the old--this is prior to the 1938 amendment--the pertinent Section prior to 1938 said:

"If a joint return is made the tax shall be computed on the aggregate income "

In the amendment which you have in front of you, your Honor, it goes on to say:

" . . . and the liability with respect to the tax shall be joint and separate."

Let me take, if I may, a few cases prior to 1938. First, I picked out three Tax Court decisions. Now in each of these three, this is basically the Commissioner's theory.

In *Grummey v. Commissioner of Internal Revenue*, on page 3 in my brief, the Commissioner advanced the theory that having elected to file a joint return, a husband and wife become "a single taxing entity" and as such the taxpayer. The Board of Appeals rejected this theory and said:

"In filing a single joint return they lost none of such rights, each remained an individual and as such

a taxpayer within the meaning of Section 118 of the Code."

The other two cases are similar. I would like to read some language from Fawsett against the Commissioner. The Board spoke in this language:

"Section 11 and 12 of the Code . . . imposes tax on each individual. . . . Privilege is not bought by the sacrifice of their other rights under the statutes. The acceptance of the privilege of filing a joint return by a married couple carries with it no denial of their individual rights under the statute. Congress has exacted no penalty for the privilege it has granted, and the Commissioner may not exact one."

Now these are civil cases, your Honor.

There are four cases I have been able to discover, your Honor, where this, prior to 1938, was argued out in the Circuit Courts of the country, and those are the only four, and all four sustain our position that these taxpayers are separate.

First, the case of Cole against the Commissioner of Internal Revenue, the Ninth Circuit. Let me briefly recite it:

The Commissioner claimed the husband and wife each were in part responsible--this is at the bottom of page 5, your Honor,--each were in part responsible for the joint tax, and it being impossible for the Commissioner to prorate it, it is necessary and proper that the husband and wife be held jointly and severally liable for the entire tax.

The Circuit Court said at page 489:

"Both on reason and authority, we hold that, under a joint income tax return, the spouse whose income to no extent has given rise to a deficiency should not be held liable for such deficiency, either in

whole or in part. In other words, the spouses are not jointly and severally liable for a deficiency arising entirely out of the separate income of one of them."

That case was adopted, was affirmed in the Seventh Circuit, the case of Crowe against the Commissioner, and the Second Circuit, the Commissioner against Rabenold.

Let me read briefly some very pertinent language, your Honor, from the opinion of that case:

"Only by implication can an intention be inferred to make them a taxable entity"—and again, keep in mind, if your Honor please,—"or to impose joint and several liability on both spouses."

You will notice the distinction between making them a taxable entity and extending the civil liability to both spouses.

"Taxing statutes are not to be extended by implication; doubts must be resolved against the Government."

Now that also, that general state of the law was adopted in the case of Sachs against the Commissioner, which is the Sixth Circuit. So the answer to it is, the only four circuits in the country who have ruled on this particular question, all ruled against the Government's position. They all said that the taxpayer by reason of the filing of this joint return do not become a taxable entity.

Now we come to this particular amendment to the Code in 1938, and that simply adds the words "and the liability with respect to the tax shall be joint and several."

Now calling your attention to page 7, and I am going to read from the House Committee Report--this is about halfway down--

"Section 51(b) of the bill expressly provides that the spouses who exercise the privilege of a joint re-

turn, are jointly and severally liable for the tax computed upon their aggregate income. It is necessary for administrative reasons that any doubt as to the existence of such liability should be set at rest if the privilege of filing such joint returns is continued."

Clearly, your Honor, the intent of Congress was simply, first, on allowing the privilege of joint returns. That was directed at the computation of the tax. And now Congress has imposed a condition that if you take advantage of this privilege they have the right now to go--civilly--to go after the wife if they prove that the husband has a deficiency, regardless of whether she had anything to do about it. But I would like to use the two words, your Honor, computation and finally collectibility. And there is no doubt that civilly the Government can compute the tax jointly and collect it jointly regardless. But the basic thing is that the taxpayers are still separate.

There is one case that has been decided since, your Honor, and that appears on page 8, and I think that the clear implication--it's Howell against the Commissioner, the Sixth Circuit--the implication of the case is clear, your Honor, and I am going to quote from the opinion.

"The deficiencies in income tax construction is a civil liability. The existence of liability both for penalties and deficiencies is determined by wording of Section 51(b) which makes no distinction"--

but I think from reading the case your Honor will be completely satisfied that at least in that Court's mind that this amendment in 51(b) was purely civil.

Now, if I may, I would like to follow through what the Government's theory is going to amount to. And their theory is strictly that these folks are an entity and they can convict them as such without breaking it down. That means in effect, your Honor,--I'm not sure of this--but

we have presumably two components making up the entity, and presumably, they have to prove, I would assume, the elements of the crime against both of them. Let's just take the element of source.

Query: Have they satisfied their burden of source if they prove that Daniel has a source? The only testimony introduced so far on Eva and the only testimony in the case is that she was a housewife since 1941. If they follow their own theory to its conclusion I say they're out the window on that, your Honor, because they have to eliminate Eva's source or prove Eva's source just as well as Daniel's.

Following again the question of the evidence between the two of them, I think the net worth statement which has been admitted as against Daniel, points it up clearly that that can't come in against Eva unless they establish Daniel was her agent in this thing. That applies to all these other assets that have been introduced, the bank accounts, everything. Title is in Eva. Does that come in against Daniel? Well, certainly not on the evidence that has been introduced, your Honor.

And in order to follow the Government's conclusion, this is the position they maintain--they say: "Throw them all into a big pot. Lump them together. It doesn't matter."

I say that that violates a very fundamental basic concept of the law of evidence.

And finally, your Honor, if you follow the Government's theory through to what I think is its obvious conclusion--let's assume a case where the husband is the tax evader, and the wife has nothing to do with it, and in fact the only thing she knows about the whole proceeding is the fact she signed the joint tax return. Now am I to believe, your Honor, that wife could be found guilty of tax eva-

sion simply because the Government could throw everything into one pot?

Certainly on those facts a jury could well find she must have known about her husband's affairs. The Government in this, your Honor, I am completely satisfied, that their theory is wrong, and it violates so many rights of the defendant in order for them to continue on this theory.

I think that is all I have to say, your Honor. I have spelled out these matters in greater length in my brief, and I have called to your attention the pertinent cases which I think will help you.

Mr. Miller: I think the argument of counsel is premature. The Government hasn't rested yet. However, we can more or less assume what the rest of the evidence will be.

I would like to briefly answer the arguments of counsel for the defendant. He makes much of the fact that in civil cases a method of determination of the collection of the tax has been arrived at, and I say that no consideration should be given to those decisions because the issues in civil cases are entirely different than the issues that arise in criminal cases.

These two defendants elected to file a joint return. The law did not require them to do it, but for purposes of their own they elected, and so they made themselves joint taxpayers just as they made themselves husband and wife by their own, I assume, voluntary act.

The defendant asks your Honor to consider that the mere filing of the joint return should not in and of itself be sufficient to warrant a conviction in a criminal case if there is evidence of tax evasion, and I certainly agree with him if that was the evidence. If she had merely signed this tax return and there was fraud in it, I would

certainly agree with him that it was not a case involving the female defendant.

But what have we got here? We can't look at just one piece of the case. We have got a married woman, who is a housewife, who is banking money in substantial sums in phony bank accounts, using her maiden name long after she was married, and putting them in an account with her brother who testified that he had absolutely no interest in these accounts.

We have overwhelming evidence that when some of this money came out of these bank accounts, either in the name of her brother-in-law by check payable to him or a check payable to her or otherwise, that certain of those sums were turned over directly to Daniel Smith and were by him used in connection with the Falmouth Bowling Club, and that certain checks were transferred into the Paine, Webber account. When you consider all the evidence that the Government has offered the picture is conclusively established that this was one pot; that for purposes of their own, and I suggest to you and will to the jury, that in addition to handling it in this manner for certain purposes which are not material, among other things it was done to evade income taxes, to cover up their income so that they wouldn't have to pay the amount of tax that was due.

Now an issue is made that we haven't shown the source of Eva's income. And I submit that we certainly have shown the source. We have shown that Daniel Smith was in the wire service business, and there has been evidence offered that he was furnishing racing information to bookies, and it is a matter of common knowledge, and I think your Honor would be required to so instruct the jury, that that is a lucrative and profitable business, and that that business was the source of his income.

tions in my mind which I don't care to disclose at the moment.

Bring in the jury.

(Jury returned to the Courtroom at 11:00 a.m.)

JOHN F. TOCHEY, Resumed.

Direct Examination by Mr. Miller, Resumed.

Q. Will you tell us how you determined the items that went into the preparation of the net worth statement that you prepared? A. Special Agent Cortese and I visited the banks in order to determine the bank accounts---

Q. Keep your voice up.

Mr. Maguire: I wonder if we might at this time enter our objection to any of this testimony pertaining to this joint net worth statement.

The Court: Yes.

Mr. Garrity: I object to it on behalf of Mr. Smith, also, your Honor.

The Court: May I see counsel for just a second?

(Conference at the bench between Court and counsel, not taken.)

Q. Before I go into that, I would like to ask you one other question. You heard testimony here about United States Savings War Bonds that were purchased for \$3750 some time in 1946. You were here when that evidence went in, is that correct? A. That is correct.

Mr. Maguire: If your Honor please, as I recall the evidence, there was an application made for the purchase of Savings Bonds. That was all the evidence as it now stands.

The Court: The jury will be the final judge of what the evidence is.

Q. And you carried that item on your own net worth

statement, is that correct? A. I did.

Q. In determining the items that went into the preparation of the net worth statement that you prepared, will you tell us in a general way what the items were that went into it and how they were determined? A. Briefly, it consists of cash in the banks, securities, other investments, United States Government Bonds, annuities, real estate holdings and other miscellaneous assets, minus mortgages and loans payable. In arriving at the net worth they were determined by personal contact with the banks, brokerage houses, searching titles, getting information from the Special Agent who had previously gone into that angle of it, from admissions by the taxpayer himself.

Now what is the first item on your net worth statement for the period where you begin--strike it out. Beginning December 31, 1945, what is the title of the first item on the net worth statement that you prepared? A. Cash in banks.

Q. Where did you obtain that figure? A. From the banks in which the deposits were made.

Q. Did you go to any other source besides the banks in order to determine the assets on hand at the beginning or rather the end of December, 1945? A. In order to determine the assets in the bank account, it wasn't necessary to go beyond the banks themselves.

Q. Has evidence been offered with respect to the amount on hand in the various bank accounts? A. That was offered in court here by the representatives from the various banks.

Q. What was the bank balance at the beginning of 1946? A. \$8,058.58.

Q. What was the bank balance on December 31 from the various bank accounts? A. Would you repeat that question, please?

Q. What was the bank balance, according to the evidence given by witnesses in court, from various banks on December 31, 1946? A. \$42,998.61.

Q. That is reported in your net worth statement for the net worth at the end of December 31, 1946, is that correct? A. That is correct.

Q. Do you have a figure recorded for cash in banks on December 31, 1947? A. \$80,000---

Q. Yes or No. A. Yes.

Q. And is that figure you have the same figure that was the total of cash in banks according to the witnesses that testified? A. That is correct.

Q. And that figure is what? A. \$80,482.73.

Q. And for the year ending December 31, 1948, you have the cash in banks? A. Yes.

Q. That was derived from---is the same figure as that testified to by witnesses here? A. That is right.

Q. And that is how much? A. \$69,300.92.

Q. And on December 31, 1949 is your figure the same as was testified to in court? A. It is.

Q. And that figure is what? A. \$42,878.72.

Q. And the figure you used for 1950, is that the same as was arrived at here in court? A. It is.

Q. And what is that figure? A. \$27,461.66.

Q. Will you tell us on that item, on the net worth statement that was submitted by the taxpayer---

The Court: Have you this set up on the blackboard the same as he has put in?

Mr. Miller: I think---

The Court: It might shorten it if that is true.

Mr. Miller: We are through with the bank accounts.

Q. Now, Mr. Toohey, will you tell us what the taxpayer's net worth statement, the net worth that was submitted by Daniel Smith on June 13, 1951 showed for cash in banks

for the end of 1945?

Mr. Maguire: If your Honor please, I don't know what relevance this has. First of all, of course, I assume it is only admissible against Dan.

The Court: Yes. What is this you have now?

Mr. Miller: This (pointing to figures on blackboard) is really a recapitulation of what all the witnesses testified to.

The Court: All right. I will permit it against Daniel Smith.

Q. What was the total cash in banks he lists on the net worth statement at the end of 1945? A. \$1,079.60.

Q. What does it list for---

Mr. Maguire: If your Honor please, I don't know--the net worth statement that he has got and is reading from speaks for itself. If this is in evidence, why, fine, but I don't understand the reason for pointing out a discrepancy.

Mr. Miller: Instead of reading the net worth statement as a mass of jumbled figures, I thought it might be more help to the jury if we picked the net worth statement as we go along, in a comparative manner and they can understand it. Then they have it as an exhibit.

Mr. Maguire: I assume the Government is basing its case on this net worth statement. I don't see what relevance the other has.

The Court: You say you don't understand. I will admit it until I find out what it is all about.

Q. According to the net worth statement submitted, what was the cash in banks at the end of 1946? A. \$13,093.08.

Q. At the end of 1947? A. \$23,393.08.

Q. At the end of 1948? A. \$23,743.08.

Q. The end of 1949? A. \$10,596.16.

Q. The end of 1950? A. The statement does not include figures for the year 1950.

The Court: Where on the board do those figures appear?

Mr. Miller: The figures he is reading now are from the net worth statement submitted.

The Court: Why point to the board then?

Mr. Miller: I wasn't pointing; I was just following it on the board.

Mr. Garrity: I move that that testimony be stricken, your Honor, that was just given from the net worth statement.

The Court: I will allow it.

Q. Now on the net worth statement you reconstructed yourself, your second item, known as securities,--- A. Securities, yes.

Q. In arriving at the figure you put down for securities, were the figures you put down based---or do they coincide with the figures that were given by witnesses yesterday?

The Court: Mr. Miller, if this statement is made up of the figures testified to by witnesses, why can't you ask him the total net worth in every year, instead of breaking it down by bank accounts, securities, and everything else?

Mr. Miller: All right.

The Court: The total on his sheet and the total there.

Q. On your sheet what was the---

Mr. Miller: We are going to take the two totals on each for comparison.

Q. (Continuing)---what is the total assets listed on the net worth submitted by Daniel Smith for the end of 1945? A. \$15,079 60.

Q. What was the total liabilities? A. There were no liabilities.

Q. Now what was the total net worth on December 31, 1945 on your net worth computation for 1945? A. \$36,276.97.

Q. What was his total net worth on his statement on December 31, 1946? A. The net worth was \$26,293.08.

Q. And according to the computation, what was the total net worth on December 31, 1946? A. \$66,830.89.

Q. And according to your computation what was the amount of the increase in net worth for that year over what it had been at the beginning of that year? A. \$30,553.92.

Q. And how do you arrive at a determination of the increase in the net worth? A. The difference between the net assets of 1945 and the net assets in 1946.

Q. Now in 1947, December 31, according to his figures, what was his total net worth? A. \$44,386.04.

Q. And according to your computation, what do you say his total net worth was on that day? A. \$112,708.01.

Q. And what do you say was the increase in his net worth for the year 1947? A. \$45,877.12.

Q. And for the year ending December 31, 1948 what does his statement say as to his total net worth? A. \$74,799.28.

Q. And what do you say according to your computation? A. \$167,577.49.

Q. And how much do you say is the increase in his net worth over the previous year? A. \$54,869.48.

Q. And for the year ending December 31, 1949, what does his net worth statement show as to the total net worth? A. \$89,151.18.

Q. What does your computation show? A. \$232,966.72.

Q. What do you say was the amount of the increase in net worth at the end of that year over the end of the previous year? A. \$65,389.23.

Q. For the year 1950, are there any figures on his net worth statement? A. There is not.

Q. What do you have for a beginning net worth statement for January 1, 1950? A. Net worth statement at the beginning--\$232,966.72.

Q. That is the figure you start with for 1950. What do you find, according to your computation, was his net worth at the end of December 31, 1950? A. \$265,785.76.

Q. According to your computation how much did his net worth increase during the calendar year 1950? A. \$32,819.04.

Q. Now after you made that computation did you then proceed to a determination of the tax liability of the taxpayers based upon this net worth statement? Just Yes or No. A. Yes.

Q. Will you tell his Honor and the jury just what you did before you started to make your computations? A. Before starting to make the computations it was necessary to take into consideration the living expenses, which were not included in those figures, any Federal taxes paid, any gains or losses that are not recognized for tax purposes, which gives you the amount then that you can include in taxable income.

Q. Will you explain to his Honor and the jury how you arrived at the true net income, using the method you have just described? What figures do you add and what figures do you subtract? A. To the net increases in each year we added living expenses, the Federal income tax paid to get the total additions to add to the increased income, and from that you deduct the capital gains not recognized, which we limited to 50 per cent of the amount as being taxable.

The Court: Where do you get an item like living expenses?

The Witness: Living expenses were accepted from the figures submitted by the taxpayer, which we considered very low but couldn't refute. Those were taken from, in most cases were taken from the net worth statement submitted by the taxpayer and sworn to by him.

Q. Then after adding those figures you arrived—

A. —at the taxable net income. And we give him credit for the income reported in the returns, if any had been reported, to determine the amount of income that was omitted on which we will assess a deficiency and any penalty that may be necessary.

Q. Would you explain a little more in detail to his Honor and to the jury how the item of living expenses was arrived at in this particular case and for each year? Tell us what you allowed for living expenses for 1946 and how you arrived at that information. A. 1946. We allowed \$3,000 for living expenses. This is the same amount the taxpayer had submitted in the net worth statement, which we accepted.

Mr. Maguire: That is admissible, I take it, only as against Daniel?

The Court: That is correct.

A. (Continuing) In 1947, 1948 and 1949 we had put in \$4,000 for living expenses.

Q. We had or he had? A. We had put in my report, in picking up the additional income. In the net worth, submitted by the taxpayer in 1947 he had "3"; I picked up "4." In 1948 he had "4," which I accepted. In 1949 he had "4," which I accepted. In 1950 I put in the same figure, "4." He had submitted no figure.

Q. So that in making allowances for living expenses you put down the figures that he stated were his living costs?

A. With the exception of one year.

Q. In which you added— A. \$1,000.

Q. Then you arrived at the total amount of what you considered unreported income, is that right? A. That is right.

Q. And then you proceeded then to determine, using the tax schedules, what the amount of tax was owing or due on the amount that you considered to be unreported income, is that correct? A. That is correct.

Q. What did you determine to be the amount of the total income tax for 1946, the total amount that you determined was due? A. In 1946 the corrected income tax due was \$13,757.63.

The Court: How much of that did the wife owe?

The Witness: These are joint returns. There was no determination made as to either party owing a specific amount.

The Court: You don't make a determination? Go ahead.

Q. That figure you have given us, is that the total income or have you given credit to the amount that was paid?

A. I have not given-- This is the total corrected tax I have given.

Q. Did you deduct from that the amount that had actually been paid or does it represent the difference?

A. This is the correct tax liability. I then give them credit for the amount of tax which has already been assessed.

Q. So it would be that figure minus whatever they had paid in that particular year? A. That is right.

Q. And do you have before you the amount they had paid in that particular year? A. \$361.

Q. So the net difference was what figure? A. 13,396.63.

Q. For the year 1947, according to your computation, what was the total tax that was due? A. \$24,273.88.

Q. How much had they paid? A. \$528.

Q. And according to your computation there was a deficiency or balance of how much? A. \$23,745.88.

Q. And for the year 1947? A. 1948?

Q. 1948. What was the total tax you determined?
A. \$21,442.80.

Q. And how much had been paid? A. \$422.

Q. And the balance due? A. \$21,020.80.

Q. And for the year 1949? A. \$26,289.69.

Q. How much had been paid? A. \$198.

Q. And the balance? A. \$26,091.69.

Q. And for the year 1950? A. \$9,618.02.

Q. How much had been paid? A. \$471.20.

Q. And the balance? A. \$9,146.82.

Q. Now, Mr. Toohey, did you check over the individual tax returns, did you examine the individual returns for the years 1946 to 1950? A. I did.

Q. Did you check over the item of interest or dividends?
A. I checked the items of interest but didn't check the dividends on securities.

Q. Do you have before you the total amount of interest that was paid in each of the five calendar years? A. On the amount of interest--

Mr. Maguire: Just Yes or No, please.

The Court: The returns themselves?

Mr. Miller: I want to put them in evidence. I have them on the returns. I could dig them out, and let him read from them or read from his notes. If they prefer, I will get the returns and let him read from those.

The Court: I will allow it. Let him read from his notes if they are the same.

Q. How much is the item of interest, bank interest?
A. Bank interest--

Mr. Maguire. If you know.

The Witness. Yes.

Q. For 1946 what was reported? A. In the returns the taxpayer combines interest and dividends.

Q. In that particular year? A. In the various years.

Q. What was it for 1946?

The Court: Let's take a recess here before we start on this.

(Morning recess.)

(Conference at the bench between Court and counsel, not taken.)

Q. What was it for 1946? A. In the individual joint returns that they filed they did not segregate the interest and the dividends and securities. I have listed the combination of both as they put it in the return. For 1946 they reported \$81.13.

Q. For 1947 how does it appear on the return? How is the item described? A. It's under—I believe, from memory, it is under the item Interest and Dividends on the face of the return.

Q. I will show you a photostat of the 1947, to save time, and read how the item reads for that year. I know that in some year there was a change. A. Under Item 4 in 1947: Enter here the total amount of your interest, including interest from Government obligations unless wholly exempt from taxation. They reported \$28.79.

Q. Did you make a determination of the amount of interest that was paid in the bank accounts during that year? A. I did.

Q. What was the figure you received? A. \$931.63.

Q. That was for 1947? A. Yes.

Q. 1948? How does it appear on the return? A. 1948. Item 4, showing the interest was \$76.26.

Q. And from the interest on the bank books that have already gone into evidence, what was the total interest that was paid? A. \$1,164.30.

Q. For 1949 what was the amount of interest reported (showing photostat to witness)? Read the way the item reads. A. Enter the total amount of your interest: \$437.75.

Q. How much did you determine to be the correct interest from the bank accounts? A. \$687.86.

Q. That was 1949. Now 1948 (handing photostat to witness)? A. I gave you that.

Q. 1950? A. 1950. They show no interest on bank accounts.

Q. Do the bank deposits indicate any interest? A. \$569.14.

Q. Do you have the figures for 1946, according to the return? A. \$81.13.

Q. And according to your examination of the bank accounts? A. \$272.55.

Q. Now of these bank accounts, how many were in the name of Daniel Smith? A. No bank accounts were in his name.

Q. Was there any one in the name of Dean Muir? A. There was.

Q. What is the interest in that account for 1946? A. \$82.22.

Q. And for 1947? A. \$162.08.

Q. And for 1948? A. \$115.84.

Q. And for 1949? A. \$150.63.

Q. And for 1950? A. \$80.65.

Q. And the rest of the bank accounts were in the name of Eva Smith or Eva Smith George and John J. George, is that correct? A. That is correct.

Mr. Miller: That is all. You may inquire.

Cross-Examination by Mr. Maguire.

X-Q. Mr. Toohey, would you be good enough to take out

I submit that we do not have to show dollar for dollar as it came in. All we have to show, and under the cases, under this source is that he was in a business, whether it was bootlegging or selling racing information or in the earlier cases black marketing during the war, or a legitimate occupation, so long as we can show he was in a business that was income producing, and we have shown that, then we have shown the source in so far as Daniel is concerned, and if Daniel had this income from this source and this money did not go into any bank accounts in his own name except the phony account in the name of Dean Muir with his sister, who said she had no knowledge of the account; all these assets went into the name of Eva Smith or Eva George and John J. George and subsequently went into their joint undertakings.

The Court: Stick to the law of the case.

Mr. Miller: I say her source of income was her husband's and do you know of any better source of income a wife has than her husband? A wife who is, according to the testimony of her brother-in-law, unemployed. Now we don't have to prove each item separately.

We have one case here, and this indictment charges simply that these two defendants by means of filing a false and fraudulent return attempted to evade the payment of their tax. That is the charge, your Honor, and nothing else, and if the Government can show, and I submit that we have up to this point conclusively, that she did by filing this false and fraudulent return, attempt to evade the income tax, then we have more than enough to go to the jury, and where she had all these bank accounts and all this unexplained income, as a housewife, and then she subscribed to these \$4,000 net income returns, I submit, your Honor, that she is certainly guilty of willful attempt to evade. We don't have to prove, as your Honor knows

and the cases hold that either or both of these defendants cheated the Government out of every nickel or dolla we charge in the indictment.

It is sufficient, according to the cases, if we establish that they defeated a large part of the tax that was due and owing. If your Honor were to adopt the theory and the philosophy of the defendant here then in no case that I can conceive of could a housewife be guilty of income tax evasion, regardless of how flagrant the circumstances or unless she was an employee and had an independent income.

I submit that we don't have to establish all of that.

The Court: The difficulty with your case is you are trying to prove too much by a net worth statement. If she had income you could trace, that would be one thing. You are proceeding on the net worth statement. I won't rule adversely. You still have some stumbling blocks ahead of you.

Mr. Miller: With respect to the female defendant, you mean?

The Court: Possibly with respect to both of them.

Mr. Miller: I submit, your Honor, and I agree with my brother, on what we have to prove in the case. We have to prove in this type of case, where we have no books or records, we have to prove that their assets and liabilities increased beyond the living expenses and the amount of income reported, and we also can show they had expenditures during those taxable years that were in excess of the reported income.

The Court: I am not going to rule on the matter now. You may proceed.

Call back the jury. Put on the witness. At the close of the evidence I will rule on this. There are some ques-

your net worth computation? You have a copy of it, do you? A. I do.

X-Q. There are some doubtful figures, in my mind, at least. First, under the caption "Other Investments" for the year 1946, you show a figure of \$4,015.28 as opposed to the year before of \$5,618.39, which is a decrease of \$1,603.11.

Mr. Maguire: (To Mr. Rowe.) Mr. Rowe, I ask you to please point these out to the jury as I recite them.

(Mr. Rowe goes to the blackboard.)

X-Q. (Continuing) Is that correct? A. That is correct.

X-Q. Fine. Would you please tell me just what that decrease was made up of? A. A decrease in the capital account, in the partnership, Taylor's Drug Store.

X-Q. And you took that actually from the balance sheet on the back of the tax return for that year? A. That is right.

X-Q. Now I want to direct your attention to the real estate for that same year, 1946. That shows an increase of \$24,977. Does that check your figures? A. That is right.

X-Q. What is that increase made up of? A. That's when the 9 to 11 Bartlett Street property was acquired.

X-Q. Will you please give us exact figures on it, how you arrived at that exact amount? A. \$34,977 is the depreciated cost--in the return they took a depreciation of \$623, making the cost, original cost \$35,600 less depreciation of \$623. I used the depreciated cost.

X-Q. Very good. Now the last asset in that year, Other Assets, in the year 1945. You have \$4,000. What is that, Mr. Toohey? A. Other Assets. What year, please?

X-Q. 1945. A. That's made up of furniture of \$2,000--that's at Shrewsbury--and \$2,000 automobile, which fig-

ures were accepted from the report that was submitted.

X-Q. You mean the net worth statement submitted by Mr. Smith? A. Right.

X-Q. All right. Now will you skip over to the year 1948, please? On real estate you have a figure, an increase from 1947 to 1948 of \$29,008.19. A. Are we on Other Assets?

X-Q. I'm sorry. We are skipping over to the year 1948 on Assets. A. Which Assets?

X-Q. Real estate. A. 1948.

X-Q. Now the increase as shown on your figures in that year, is \$29,008.09? A. Yes.

X-Q. What is that made up of? A. On the St. James Road property, the previous year, it was \$8,600; in 1948 that increased to \$23,231.09.

X-Q. What is that increase made up of? Are those the repairs that were made? A. The repairs made on that property by various contractors.

X-Q. Fine. What is the other item or items that make up this? A. The Bartlett Street property—that decreased slightly due to allowing the \$623 depreciation from the previous year, and the summer residence was acquired in 1948, down to Aquashenet, outside Falmouth, with a cost which was given by the taxpayer of \$15,000.

X-Q. Now the figure, Other Assets, in the year 1948 you show an increase of \$3678.70. What is that made up of? A. Summer residence. There was \$2,000 furniture. That was the figure submitted by the taxpayer and accepted. There was an automobile acquired, a Cadillac, at a cost of \$4,678.70. The previous year there was a Cadillac at approximately \$3,000, which results in about a \$1,678 increase in the value of the automobile on hand.

X-Q. Very good. Now 1949. I direct your attention to the real estate item. You show an increase there of

\$29,892. Please tell us what that is based on. A. On the St. James Road property there was a small increase of slightly over \$400 on some additional bills that came in for improvements in that year. There was a decrease in the Bartlett Street property due again to the allowance of \$623 depreciation. On the Main Street, Falmouth land—that Falmouth Club was purchased in that year, with an allocation on the \$75,000 as between land, buildings, inventory, furniture and fixtures.

X-Q. Excuse me, Mr. Toohey. I call your attention to the fact the Bowling Club was purchased in the next year. A. I'm looking at 1949.

X-Q. I beg your pardon. You are correct. A. (Continuing) So in that case that land—the allocation of that land was \$2,448.98, based on assessed value as near as possible, and on the information from Mr. Gediman down there, who was in on the deal between the two.

X-Q. That figure is based on what Mr. Gediman told you, is that right? A. And also a Revenue Agent examined the party that sold the property.

X-Q. What Revenue Agent? A. I don't have his report here. I did at that time.

X-Q. The next item on that Other Assets— A. Pardon me. Oh, that's real estate. I'm sorry.

X-Q. Have you concluded on the real estate? A. I have.

X-Q. Other Assets for the year 1949, \$8,550. A. 1949. There was \$5,000 added in on that Surrey Room. \$5,000. An allocation of furniture and fixtures acquired at the time of purchase in which \$75,000 was involved. The other two items that make up the figure—

X-Q. Are those the furs? A. The furs, which amount to \$3,750.

X-Q. Now the year 1950. I direct your attention to the real estate item. There was an increase there, according

to your figures, of \$28,385.21. A. The St. James Street property. The increase of roughly \$6,000 is due to improvements on that property, of which I have a list. There was a decrease in the Bartlett Street property again as to the \$623. There was an increase in the Falmouth land. That's in view of the fact they purchased a \$4,500 piece of land. There was some improvement made on it: \$164.25 and \$1,433.14. There was a decrease on the Falmouth Bowling Club building, in which the figure—I should have given you the figure allocated to the building of \$27,551.02, which is depreciated cost.

X-Q. What's that again? A. In 1949 we had a depreciated cost on that building of \$27,551.02. That's at the close of 1949. Allowing an additional depreciation we reduced the cost base in 1950 to \$26,724.49.

X-Q. Would you repeat that? A. \$26,724.49.

X-Q. Thank you. A. Then during the year 1950, additions made to the building, total amount \$17,278.42.

X-Q. Now those are the repairs that were made or at least paid for by the Falmouth Bowling Club, Inc.? A. That is correct.

X-Q. Now I direct your attention to Other Assets, Mr. Toohey. That shows an increase of \$15,669.18. What is that based on? A. On the Surrey Room improvements, furniture and fixtures, and other items, that increase that from \$5,000 to \$20,459.18.

X-Q. On those increases there again those were the items that were paid for by the checks of the Falmouth Bowling Club, Inc., is that correct? A. That is correct.

X-Q. Very good. Is that the complete item? A. It is.

X-Q. All right. Now on the Liabilities, for the year 1950. Your figures show a decrease of \$16,081.52. A. What year?

X-Q. This is the year 1950. A. 1950. At the close of

1949 there was \$6,000 that was borrowed from a Worcester bank, the Worcester Five Cents Savings Bank, which was charged to the account in 1950, which automatically took it off the Liabilities.

X-Q. Whose account was that, Eva or--- A. That would be Eva or Eva and George.

X-Q. All right. Very good. Now would you please go on? A. On the Joseph A. Lalande. That's the 9 to 11 Bartlett Street mortgage. That was reduced \$1,000.

X-Q. All right. A. (Continuing) On the Lester Crane property, the mortgage was reduced by \$4,000.

X-Q. How much? A. \$4,000. At the Worcester Mechanics Savings Bank he borrowed \$7,300, at the close of 1949, which was charged to his account in 1950, which eliminated that item.

X-Q. Is that account in the name of Dean Muir? A. That is right. Then in addition to that there are two other items. Accounts Payable, one due John H. Pray for money due on furniture and fixtures; another on Olds Electric. The first was for \$1,661.88; the second for \$556.60. That makes up your total.

X-Q. Now, Mr. Toohey, in making this computation you worked it out on a joint basis, is that correct? A. That is correct.

X-Q. You made no effort whatsoever to break it down as between Daniel and Eva? A. For my purposes, no.

X-Q. That's all I'm asking you, Mr. Toohey. In other words, you simply have taken the assets that have been introduced here as standing in Daniel's name or as against Eva's name and lumped them together in one pot? Isn't that basically the basis of your computation here? A. That is correct.

X-Q. Now as far as you are concerned your job in effect is to try to pull together these various elements of

testimony and end up with this net worth statement which you have introduced? A. Yes.

X-Q. Of course, you are thoroughly familiar with the Government file and the work that has been done by Agents, either with you or your predecessors? A. Not necessarily.

X-Q. I ask you if you are thoroughly familiar. A. No, I am not.

X-Q. You mean there are some facts possibly in that Government file about which you don't know that pertain to this case? A. That I'm not interested in; I'll answer it that way.

X-Q. But at least all the pertinent data in the Government file? A. That is correct.

X-Q. Pertinent to this case, you know all about? A. I do.

X-Q. As far as Daniel is concerned the evidence here has shown, the assets that have been introduced against him, this net worth statement that has been introduced against him, and also there has been some evidence as to what Mr. Smith's business is; that is largely what the testimony has been as far as Daniel is concerned? A. That is right.

X-Q. Now as far as Eva is concerned there has been introduced here in evidence assets by way of bank accounts or other items and also the evidence that she was a housewife from 1941 at the time of her marriage down until today, is that correct? A. That is correct.

X-Q. And as far as the evidence is concerned and the file that is the complete investigation as far as Eva is concerned--what's been introduced here? A. That is right.

X-Q. Fine. Now no investigation whatsoever was done by the Government to determine, for instance, anything about Eva's parents?

Mr. Miller: Parents?

X-Q. (Continuing) Parents, mother and father? Just Yes or No, Mr. Toohey.

Mr. Miller: If you know.

A. Not as far as I was concerned.

X-Q. Is there anything in the file, Mr. Toohey, or been in evidence here that pertains to Eva's mother and father?

A. No.

X-Q. Nothing whatsoever? A. Not that I know of.

X-Q. Very good. No evidence, of course, then as to what business the father was in or anything along that line?

A. No.

X-Q. As a matter of fact, you don't even know whether the father is living or dead, according to the file and the evidence, do you? A. That is correct.

X-Q. Do you have any information in the file as to what Eva's employment was prior to her marriage in 1941?

A. No.

X-Q. The Government has made no investigation on that either. The short answer to it is, Mr. Toohey, as far as the Government is concerned, the only investigation they made as far as Eva is concerned was in effect digging up these assets which have been introduced in evidence. That's about the extent of it, is it not? A. That is correct.

X-Q. Now in making up your computations, starting in the year 1945, you based your---for instance, Cash in the bank---as far as Eva's bank accounts were concerned, Mr. Toohey, on the assumption that those were all the bank accounts she owned, is that correct? A. When we started the examination---

X-Q. Just answer my question, Mr. Toohey. A. Repeat the question, please.

X-Q. In making up this net worth statement which you introduced, when you arrived at that figure of Cash in the

banks, as of the end of 1945, of \$8,058.58, that was based on the assumption that the bank books which you have examined or introduced in evidence here were all the bank books that Eva ever had, is that correct? A. That is correct.

X-Q. And it is also based on the assumption that Eva, as far as your investigation and your file is concerned, did not have any cash? A. That is correct.

X-Q. Correct. And if perchance Eva did have a million dollars in a safe at home or safety deposit box, obviously your calculations here would be in error? A. If she had, if she had, yes.

X-Q. That's all I asked you, Mr. Toohey. As a matter of fact, if perchance Eva had received money by way of gift or inheritance or loans repaid prior to this date of 1945, that would also make a change in your calculations, would it not? A. It would.

Cross-Examination by Mr. Garrity.

X-Q. Now I understood you to say in answer to Mr. Maguire, Mr. Toohey, that the items in this net worth computation of furniture were included in the defendant's net worth statement as submitted to you, is that correct? A. Submitted to me in conference that we had on July 17.

X-Q. That was July 17, 1951? A. That's right.

X-Q. On that occasion he said to you that he had furniture and fixtures whereas of that time? A. Falmouth and Shrewsbury.

X-Q. Exactly what did you ask him on that point? A. As to how he would break down the cost of that property down there in Falmouth. He said, "Fifteen." I said, "Was it furnished?" He said, "Yes." I said, "How much did

you pay for the furniture?" He said, "\$2,000, about \$2,000."

X-Q. What else did you have to say about furniture?
A. That's all.

X-Q. Did you ask him about furniture at any other place? A. I believe at that time my notes indicate that I asked him about the \$2,000, on the approximate value of furniture in Shrewsbury.

X-Q. There is some doubt about it in your mind?
A. Well, I wouldn't say that because I have in my notes this, which indicates I asked a question on it.

X-Q. Let me see those notes.

(Witness hands notes to Mr. Garrity.)

X-Q. These are the notes you used to refresh your recollection in the course of your testimony? A. That is right.

X-Q. I see the figure---furniture---\$1,500. A. That's in 1939.

X-Q. 1939. Can you point me out any other figures in your notes with reference to furniture? A. Here (indicating).

X-Q. Keep your voice up. You are testifying, Mr. Toohey. A. Here (indicating).

X-Q. You have just pointed out to me a second notation with reference to furniture in the amount of \$2,000. Is that correct?

(No response.)

X-Q. You have just pointed out a second reference to furniture. Can you answer me, please, sir? A. I'm testifying. I just want to say---this is summer residence that I'm giving you here.

X-Q. Well, you have indicated an item of \$2,000 for the summer residence, is that right? A. That's the summer residence, \$2,000, that I gave you.

X-Q. That's in what year, 1948? A. That's 1948.

X-Q. Now please come to the next point in your notes with reference to furniture. A. Prior to that, this Worcester property, 36 Williams Street, he had \$1,500.

X-Q. That was as of 1939? A. Which he--

X-Q. Is that right? A. (Continuing)--had on hand in 1945.

X-Q. Does your note list the 1939 furniture as \$1,500? A. \$1,500.

X-Q. Have you any further note on that point? A. It does not, other than the \$1,500.

X-Q. So your complete basis for including a figure of \$2,000 for each December 31 of the years 1945 through 1950 are the notes that in 1939 he had \$1,500 worth of furniture at Williams Street, and in 1948 he purchased \$2,000 for his summer residence in Falmouth, is that right? A. That is correct.

X-Q. Now with reference to automobiles, which are listed here in your net worth computation, I ask you for the basis of this figure \$4,678.70, which appears at the end of 1948. A. The cost basis, as submitted in the invoice, I believe that was.

X-Q. Please tell me a bit more as to where and from whom you obtained this figure. A. Fitz-Williams or Fitz-Morris Automobile Agency on Shrewsbury Street, Worcester.

X-Q. Are you talking now about testimony that you heard in this case in this courtroom? A. I visited the office.

X-Q. Please! Are you talking about testimony you heard in the case in this courtroom? A. No.

X-Q. You are not. Is it not true that the witness from the automobile company who was in this courtroom yesterday gave no testimony whatsoever about a car in 1948 but

rather gave testimony about an automobile purchased in 1947? A. That I'm not sure of. I'm simply going by my net worth statement.

X-Q. Precisely. Is it that situation, with reference to this complete summation, namely, that you are going on the basis of what you drew up before the case rather than on the evidence which was introduced in the case? A. It is--that's a copy of my net worth statement.

X-Q. So that in instances other than the automobile you are not taking the testimony as given in this courtroom but rather as compilation you had before this case was called to the bar? A. I am testifying as to my figures in the net worth statement.

X-Q. A statement which was prepared before this case was ever submitted to the Grand Jury? A. That is right.

X-Q. Now so far as testimony in this courtroom is concerned, do you recall any testimony as to whether the Bartlett Street property was owned subsequent to 1946, the date when it was purchased? A. I don't remember the testimony as to when it was exactly purchased.

X-Q. Do you remember any testimony as to whether or not the residence at St. James Road, Shrewsbury, continued in the ownership of Mrs. Smith subsequent to the date of its acquisition? A. I don't know of any change made in title from the date she acquired it.

Mr. Garrity: Would you please repeat the question?
(The previous question was read.)

A. I do not remember.

X-Q. And the same thing can be said, can it not, of other items in this net worth computation, that you are relying not on testimony but rather on your work before you? A. I am relying on my work as established in the net worth statement.

X-Q. Coming to the year 1950, I would like to direct

your attention to the figures which are contained in Assets for the year 1950, which are represented in evidence by checks of the Falmouth Bowling Club, Inc. Would you please consult your notes and state the total amount charged against my client in this net worth statement as the result of checks of the Falmouth Bowling Club? Would you tell us what those checks total?

Mr. Miller: Do you have a figure, Mr. Garrity?

Mr. Garrity: No, I don't.

A. To get the total figure would take some time to go through it item by item.

X-Q. Maybe we can shorten it to this extent. Didn't you testify in answer to Mr. Maguire's questioning that of the real estate figure for 1950 a certain number was attributable to expenditures by the Falmouth Bowling Club? A. Yes.

X-Q. Would you give us that figure, please? Look at your notes, please. A. I have a total here of \$17,560.98 in improvements to the Falmouth Bowling Club, added in 1950.

X-Q. \$17,---what? A. \$17,560.98.

X-Q. Right. A. (Continuing) In addition there is \$1,597.39 that was allocated to improvements.

X-Q. I'm asking not what was allocated but what sums were paid by checks of the Falmouth Bowling Club that were admitted in evidence in this case. A. That's what I just said.

X-Q. Was that figure of \$1,597.39 represented by a check of the Falmouth Bowling Club? A. That is right.

X-Q. To whom was it payable, please? A. One check went to Turner Brevocal.

X-Q. How much? A. \$1,433; then a check for landscaping of \$164.

X-Q. What else went into the \$1,597 item? A. That's what it is; \$1,597, right there.

X-Q. In 1950 did you use other figures as represented by checks of the Falmouth Bowling Club in this net worth computation? A. Well, there are figures for furniture, figures for real estate.

X-Q. I would like those. You have given us a figure of \$17,560, represented in the real estate total, is that right? A. That is right.

X-Q. Would you give us please the figure represented in the total of the furniture? A. \$17,072.82.

X-Q. And is there any other item in this 1950 total represented by checks of the Falmouth Bowling Club? A. I believe not.

X-Q. So that totalling those figures, which you have just given us, comes to a total of approximately \$36,000? A. That's right.

X-Q. Somewhat in excess of \$36,000. And what, sir, is the increase in net worth which you have charged to my client during the year 1950, according to your computation?

Mr. Miller: He's charged them to both.

A. \$29,700.

X-Q. So that if the checks of the Falmouth Bowling Club should be withdrawn from this computation of yours, the net worth statement, as you have prepared it, would show a decrease for 1950 rather than an increase? A. That is right.

X-Q. And there would be no additional tax owing for 1950 according to your computation. That is right, isn't it? A. That is right.

X-Q. Now you have had occasion to make a thorough analysis of the books and records of the Falmouth Bowling Club for the year 1950, have you not? A. Yes.

X-Q. And I show you a paper and ask you whether or not this group of papers which I show you contains papers prepared by you, and I would ask you also to identify whatever papers were prepared in that sheaf. A. This is a copy of my report on the Falmouth Bowling Club, Incorporated.

X-Q. Now is the entire group of papers a copy of your report on just those papers except for the first two sheets? A. That is right.

X-Q. Now if I separate from this group the first two sheets, we have a copy of your report on the Falmouth Bowling Club? A. That is right.

X-Q. Let me direct your attention, Mr. Toohey, to the computation on page 5 of your report on the Falmouth Bowling Club. Do you find that page? A. I do.

X-Q. It says Exhibit A. A. I do.

X-Q. And on that page you have computed, have you not, the profit and loss statement for the year ending December 31, 1950 of the Falmouth Bowling Club, Incorporated? A. I did.

X-Q. May I direct your attention to the figure following the words Leasehold Expense in the amount of \$7,246.24? Do you find that? A. I do.

X-Q. What, sir, is the basis of that figure in the computation which you now have before you? A. In analyzing the checks of the corporation I found that they had expended approximately \$35,000 for leasehold improvements. Over a five-year period I permitted him to write off that leasehold expense—that figure there.

X-Q. Isn't it true, sir, the five-year figure is based upon the lease from—under which the Bowling Club occupies the premises? A. That is right.

X-Q. You have seen that lease, have you not? A. I have.

Mr. Miller: If you want to offer it, I have no objection.

Mr. Garrity: I offer it in evidence.

The Clerk: Defendant's Exhibit L.

(Lease, from Eva George Smith to Falmouth Bowling Club, Inc., marked Defendant's Exhibit L and received in evidence.)

The Court: We will recess now until two o'clock.

(Luncheon recess.)

AFTERNOON SESSION - 2:00 P.M.

JOHN F. TOOHEY, Resumed.

Cross-Examination by Mr. Garrity.

X-Q. Now before the noon time recess, Mr. Toohey, we are going over a sheaf of papers and there appeared to be 1, 2, 3, 4, 5, 6, 7, 8, 9 papers in that group of papers, constituting a report made by you in connection with the Falmouth Bowling Club income for the year 1950, is that correct? A. That is right.

X-Q. And I direct your attention to a figure opposite the words "Leasehold Expense" in the amount of \$7,246.24. As I recall your testimony you stated that that was one-fifth the total leasehold improvements made during that year, is that correct? A. That is right.

X-Q. And then there was admitted in evidence a lease, which is Defendant's Exhibit L, and this is a lease between Eva George Smith of Shrewsbury and the Falmouth Bowling Club, Incorporated for a period of five years. Do you remember that? A. I do.

X-Q. And, therefore, your having divided a figure by one-fifth is because of the fact the lease ran for a five-year period, is that right? A. That is right.

X-Q. Now multiplying the figure in your report by five gives us a total of \$36,231.19. What is your answer, Mr. Toohey? Isn't that a correct multiplication? A. It is, based on that figure. I haven't my work sheets with me, so I don't know exactly it to the penny. I assume it is correct.

X-Q. You do know, do you not, that the total of the three figures which you stated before the recess were included in this 1950 column as evidence of income against my client in this case totalled approximately the same as the figure which I just stated to you, right? A. Right.

X-Q. And is it not true, sir, that in computing the income of the Falmouth Bowling Club in that report and you used the same figures as evidence of income against the Falmouth Bowling Club, Incorporated as you did against the individual defendants in this case? A. That is correct.

X-Q. And based upon your report that you have in front of you there, there has been a tax assessment levied against the corporation, is that right? A. That is right.

Mr. Garrity: At this point, your Honor, I should like to offer in evidence a certified copy of Tax Court Docket Numbers and Pleadings in the case of Falmouth Bowling Club, Incorporated vs. Commissioner of Internal Revenue.

The Court: (To Mr. Miller) Don't hold us up while you read that.

Mr. Miller: I'm going to object to this. I don't see how this is material, your Honor.

The Court: What is your purpose?

Mr. Garrity: The purpose is to show that the same figures have been assessed against the Falmouth Bowling Club as against the individuals.

Mr. Miller: He just said that he admitted that.

The Court: All right.

The Clerk: Exhibit M.

(Certified Copy of Tax Court Docket Numbers and Pleadings in Falmouth Bowling Club, Inc. vs. Commissioner of Internal Revenue marked Defendant's Exhibit M and received in evidence.)

X-Q. Now you have examined the books of the Falmouth Bowling Club for the year 1950, have you not?

A. I have.

X-Q. Would you thumb through that briefly and tell me whether or not those are the books you examined?

A. They are.

Mr. Garrity: I offer these in evidence.

Mr. Miller: No objection.

The Clerk: Exhibit N.

(Receipts and Disbursements Book, 1950, marked Defendant's Exhibit N and received in evidence.)

Mr. Garrity: I would like to offer at this time a certified photostatic copy of a deed, Joseph A. Lalande to Eva F. Smith, relating to the Bartlett Street property.

Have you any objection?

Mr. Miller: For what purpose is it offered?

Mr. Garrity: It is being offered to establish the facts with reference to this witness's testimony.

The Clerk: Exhibit O.

(Photostatic copy of deed, Joseph A. Lalande to Eva F. Smith, marked Defendant's Exhibit O and received in evidence.)

Mr. Garrity: And also a deed to the St. James Road property from William F. Lucey and Grace E. Lucey to Eva George Smith, dated July 9, 1943.

Mr. Miller: No objection.

The Clerk: Exhibit P.

(Photostatic copy of deed, William F. Lucey and Grace E. Lucey to Eva George Smith, dated July 9,

1943, marked Defendant's Exhibit P and received in evidence.)

X-Q. Now this morning you read certain interest figures from your file of the case, is that correct? A. That is right.

X-Q. And you read figures from the tax returns of the defendants and then figures which you computed yourself as being accurate interest figures based upon these bank books? A. That is right.

X-Q. Now isn't it true, Mr. Toohey, that the interest, according to your computations, as stated on the witness stand this morning, all of the interest which they received from these banks is included in the figures at the end of each year, which you have entered in the net worth computation? A. That is correct.

Mr. Garrity: I would like also to offer at this time, if the Court please, a certified copy of the Certificate of Incorporation of the Falmouth Bowling Club, Incorporated.

Mr. Miller: No objection.

The Court: What is the date of that?

Mr. Garrity: The date of the Certificate I have is November 14, 1939.

The Clerk: Exhibit Q.

(Certified copy of Certificate of Incorporation, Falmouth Bowling Club, Inc., marked Defendant's Exhibit Q and received in evidence.)

The Court: Are you through with this witness?

Mr. Garrity: Practically.

X-Q. I would like to direct your attention, Mr. Toohey, to testimony given on the occasion of the hearing in this Court in January of this year wherein you stated in answer to Mr. Miller's question as follows:

"Mr. Toohey, did you make a determination of the

tax deficiency due by the taxpayer on the basis of the net worth statement that he submitted?"

And your answer:

"I did not."

A. That's right.

X-Q. Is that still your testimony? A. It is not.

X-Q. It is not? A. It's my testimony, yes, to that point.

X-Q. To this point you had done no such computation?

Mr. Miller: You mean as of last January.

A. No.

Mr. Miller: All right.

X-Q. Is this an accurate statement of what you did in connection with this case as of January 30, 1953? A. That is right.

X-Q. Now one more question. Did you, Mr. Toohey, compute the figures upon which there was assessed against these defendants a jeopardy assessment as of a date in 1951? Do you have that date in your file?

Mr. Miller: Just a moment. I pray your Honor's judgment. I don't see how this is material.

The Court: I will allow it.

A. I have not the exact date that I computed it. Approximately, it would be around October, 1951 when I submitted my report.

X-Q. I show you a sheaf of papers and ask you whether it is not true that they contain your report upon which that assessment was based? A. Not necessarily. There may have been a few adjustments made between that and the final report submitted.

X-Q. Do you have a copy of the Indictment in this case?

A. I do not.

X-Q. I'm going to show you a copy of the Indictment, Mr. Toohey, and ask whether there is any difference in the figures in the Indictment in this case and the figures which

you included in your jeopardy assessment back in October of 1951?

Mr. Miller: Just a moment. I object. I don't see what that has to do with what he is charged with.

The Court: I don't think it is objectionable. Go ahead.

A. Have you the figures I submitted on the jeopardy assessment?

X-Q. The question is this, Mr. Toohey: Are the figures in the report which is dated--when is the report dated?

A. October 3rd, 1951.

X-Q. Well, this is true, is it not, that the figures in your report, dated October 3, 1951, are the identical figures which have been the basis for your computation in this courtroom?

A. They are not.

X-Q. Are they the identical figures which are contained in the Indictment? A. Yes.

Mr. Garrity: This is my last question, your Honor.

X-Q. In your report relating to the income of the Falmouth Bowling Club you enclosed, did you not, a Form 870?

[A long pause.]

The Court: Can you answer that?

Mr. Miller: If you know.

A. I don't know. I may have.

X-Q. Do you recall the testimony from Agent McMahon with reference to a Form 870? Do you, Mr. Toohey?

[A long pause.]

The Court: Can't you answer more promptly, please?

A. I don't remember whether--the only thing I remember is that I couldn't have submitted an 870.

X-Q. What is a Form 870? A. It's an agreement to the assessment of the tax.

X-Q. I show you the papers you have already identified as your report, and they include, do they not, a Form 870?

A. The office does include a Form 870.

X-Q. This is a Form 870, is it not? A. That is right.

Mr. Garrity: I offer in evidence the sheaf of nine papers constituting a copy of the witness's report on the Falmouth Bowling Club.

Mr. Miller: No objection.

The Clerk: Exhibit R.

[Sheaf of nine papers, Toohey Report on Falmouth Bowling Club, marked Defendant's Exhibit R and received in evidence.]

Mr. Garrity: No further questions.

Redirect Examination by Mr. Miller.

Q. You were asked by Mr. Garrity whether or not you used the same figures in connection with these two individuals in determining their increases in net worth as you did against the Falmouth Bowling Club in setting up its statement, and your answer to that was Yes. Is that correct?

A. That is right.

Q. Will you explain to me why you used the same figures?

A. The reason for that is this: In the corporation there were assets that were acquired in the amount, roughly, of \$36,000, which in my opinion automatically became income to the owners of that corporation. In other words, it became their property, and although the corporation was not at a ~~w~~'s length, the corporation and the individuals were the same, they received the benefit of this, and on taxing them on this benefit it was necessary to tax them on everything that was transferred to them or could be transferred to them.

Q. In arriving at that conclusion did you give any consideration to the endorsement appearing on certain checks that were paid out by Paine, Webber, Jackson & Curtis?

A. I did.

Q. What consideration did you give? A. In this way, all these checks that were—

Mr. Maguire: Don't the checks speak for themselves, your Honor?

The Court: I should think they do.

Mr. Miller: He brought up the question. I wanted it explained.

Mr. Maguire: He has already explained.

The Court: This witness this afternoon was going to take twenty minutes.

Mr. Miller: All right. I will withdraw the question.

Q. In setting up your figures here on your net worth statement you resorted in part to the net worth statement submitted and in part to other figures? That is correct, isn't it? A. That is correct.

Q. In the taxpayer's net worth statement did he have an account marked "Automobile"? A. He did.

Q. And what did he set up for each year for the word "Automobile"? A. 1945: \$2,000; 1946: \$2,000; 1947: \$3,000; 1948: \$3,000; 1949: \$3,000.

Q. Now at the beginning of that period I believe in your statement you set up the item of \$2,000 for furniture, and you were asked by my brother whether or not you had a memorandum in your file with respect to that information. Do you recall finding such a memorandum? A. Only the \$1,500.

Q. Is your memory refreshed now as to how that \$1,500 figure or \$2,000 found its way into the net worth statement that you prepared? A. Only that ordinarily in setting up a net worth statement we give them as broad a base as possible. On the assumption that assets were acquired at times, we may increase that base, and it may be the reason—it's the only reason I could have put a \$2,000 figure in there. He wasn't entitled to it.

Q. You gave him \$500 more on furniture than your notes show? A. That's right.

Q. And that was to his advantage, is that correct? A. It was to his advantage.

Mr. Miller: That is all.

The Court: That's all. Step down. Next witness.

Mr. Miller: That is the Government's case, your Honor.

The Court: I will excuse the jury for about ten minutes.

[The Jury leaves the Courtroom at 2:20 P.M.]

The Court: May I see counsel up here?

[Conference at the bench between Court and counsel, not taken.]

[The Jury returned to the Courtroom at 2:25 P.M.]

The Court. Mr. Foreman, ladies and gentlemen: I'm addressing myself now to the twelve jurors. A motion has been filed for the acquittal of the defendant, Eva Smith, and I am going to allow that motion, and I ask your Foreman, on behalf of all of you, to return a verdict of Not Guilty when the Clerk inquires.

I will tell you why I am doing that so that you will know. This case is predicated upon a net worth statement theory and in order to establish how net worth increases or may increase from year to year it is necessary to establish a base period, something to start from. Well, in the case of Eva there is no base to start from that has been established or could be established in the eyes of the law and, therefore, nothing could be shown as to increases, so I will ask the Foreman to return a verdict of Not Guilty in the case of Eva.

The Clerk: Madam Forelady, what say you as to the defendant Eva Smith, the defendant at the bar, on Count 1: Guilty or Not Guilty?

The Forelady: Not Guilty.

The Clerk: Not Guilty by direction of the Court. On Count 2?

The Forelady: Not Guilty.

The Clerk: Count 3?

The Forelady: Not Guilty.

The Clerk: Count 4?

The Forelady: Not Guilty.

The Clerk: Count 5?

The Forelady: Not Guilty.

The Clerk: Madam Forelady and members of the Jury: Hearken to your verdict as the Court has directed it. You have found for the defendant, Eva Smith, Not Guilty on all counts.

The Forelady: That's right.

The Clerk: So say you, Madam Forelady, so say you all, members of the Jury.

The Forelady: We do.

The Clerk: Eva G. Smith, the Court orders that you be discharged and you go without day.

The Court: Now I will hear the defense.

Mr. Garrity: Mr. Delaney, and I would like Mr. Rowe sworn.

WILLIAM J. DELANEY, Sworn.

Direct Examination by Mr. Garrity.

Q. Your name, sir? A. William J. Delaney.

Q. And your address? A. Lawrence, Massachusetts.

Q. What is the street address, please? A. 8 Washington Way.

Q. Were you at one time employed in the office of the Intelligence Unit of the Treasury in Boston? A. I was.

Q. In what capacity? A. As a Special Agent.

Q. For what period of time were you employed in that office? A. From 1945 to 1949, I believe.

Q. So that you left that office more than a year before you were retained by the taxpayers in this case to represent them? A. I was.

Q. In connection with your representing them you had numerous conferences with Special Agent McMahon with reference to the tax liability of Daniel and Eva Smith?

Mr. Miller: Well, I think we ought to have a better description. I think the word "numerous" is a little misleading. We ought to let the witness testify.

Q. About how many conferences did you have, if you know, offhand? A. I do not know offhand.

Q. Did you, Mr. Delaney, bring with you the diaries that you kept at the time while you were representing Mr. Smith in connection with this case? A. I did.

Q. You have them with you today? A. Yes.

Q. Would you take them out, please? A. Yes, sir.

Q. Come down in your diary, if you will, to the date of April 30, 1950. On that day did you have a conference with Mr. McMahon? A. Pardon—1950?

Q. 1951. Excuse me. A. I did.

Q. And have you a notation in your diary before you which refreshes your recollection as to what transpired at that conference? A. I have a few notes.

Q. And referring to your notes, in so far as you have to, in order to recall what occurred, please tell his Honor and the Jury the substance of the conversation between you and the taxpayer and Agent McMahon on that day. A. Conference started at 2 P.M.

Q. Please tell the conversation. A. Conversation.

Q. And I want your memory, Mr. Delaney. A. As I recall it, it was a general conference on Mr. Smith's tax case and the set-up of the Union News Company.

Q. Please state everything that you can recall being said in the course of that conversation. A. Mr. McMahon was very interested in how this so-called wire service operated, who were the people it served, how much income was received from the wire service, and the names of the various clients or people who subscribed to this service.

Q. And was there any conversation with reference to any income reported by Mr. Smith on his tax returns? A. Not that I recall, no, sir.

Q. Do you recall any statement of this nature by Mr. Smith: that he stated that he had received sums of money from the news service which he did not put on his tax return? A. No.

Q. Are you certain that no such conversation occurred? A. As I recall it, it was strictly on the set-up of this wire service.

Q. At any time during your representation of Mr. Smith did you have any conversation with Mr. McMahon about a form 870? A. No, I did not.

Q. Did you in the course of your representation of Mr. Smith prepare a net worth statement, so-called, which has been offered in evidence and which has been marked Government's Exhibit 20? A. Yes, I did.

Q. When did you first show that statement to Mr. McMahon? A. You mean in the completed form?

Q. Yes. First, when did you first show it to him in completed form? A. June 11th, I believe.

Q. And do you have any notes in your diary as of that date? A. Yes, I have.

Q. Do you recall having a conference with Mr. McMahon on that day? A. Yes, I do.

Q. Please tell his Honor and the ladies and the gentlemen of the Jury what conversation there was between you and Mr. McMahon on the 11th of June, where the conversation was held and everything you can recall about it. A. The

conversation was held at 40 Central Street, which was the headquarters of the Intelligence Unit, the Bureau of Internal Revenue, at that time. I had another conference with another Agent, and when I completed that conference I went in and saw Mr. McMahon. I had with me this completed net worth statement that I had typewritten and bound and I handed it to him, and he looked at it and he said, "What is the deficiency?" And I said, "Approximately \$28,000."

Q. Excuse me. Had you previous to that date submitted to him an exact computation? A. On my rough papers, yes.

Q. But it was an exact computation, was it, of the tax and penalty which is figured in the net worth statement?

A. That is right.

Q. Please continue. A. He looked at it, and he said, "Do you think Mr. Smith would sign this statement?" And I said, I did not know but that I had an appointment with Mr. Smith at one o'clock and that I would ask him.

Q. Did he say anything else that you remember? A. The only thing is I have a note here.

Q. Well, looking at the note to refresh your memory, what did he say? A. The note I have is this—

The Court: No. Does it refresh your memory?

The Witness: Oh, pardon me.

Q. What did he say that you can remember on the basis of your note? A. That he would close the case in the usual way.

Q. Now was there any further conversation between you and Mr. McMahon on that occasion? A. On this occasion? No, sir.

Q. What did you do after you had your conversation with Mr. McMahon on that morning? What did you do next on the case? A. I returned to my office.

Q. And please describe to the Court and Jury the events with reference to this case that transpired from then on. A. I returned to my office for my conference with Mr.

Smith, and I told him that I had just returned from seeing Mr. McMahon and that Mr. McMahon wanted to know if he would sign his net worth statement.

Q. And during the course of that conversation or conference between you and the taxpayer did you receive a telephone call? A. I did.

Q. Please state, first, whether you placed the call or whether you received the call. A. I received the call.

Q. Who was on the phone? A. Mr. McMahon.

Q. What did he say to you and what did you say to him?

A. He asked me if Mr. Smith would be willing to submit a check with this offer.

Q. Was there some discussion as to the amount of the check? A. I told Mr. McMahon that Mr. Smith was here and I turned to Mr. Smith and I said to him, "Dan, they want some money to go along with this statement." And he said to me, "How much do they want?" And I said, "It's usually the amount of the tax." And he said, he would see what he could do.

The Court: You referred to that as an offer. The first statement—the money was to accompany the offer?

The Witness: Possibly the net worth statement.

Q. Was there mention of the figure at that time during that telephone conversation? A. No.

Q. Are you certain there wasn't mention of a figure, or is it that you just cannot recall one way or the other?

A. The only thing I recall is about approximately the tax.

Q. Getting back for a moment to one question relating to the conference between you and the taxpayer and Agent McMahon on the 30th of April, was there some talk about cash at that conference? A. There was.

Q. And was there some talk about— Well, state what that talk was. A. Well, Mr. Smith told me that one time prior—

Mr. Miller: Just a moment.

Q. No. What he told Mr. McMahon in your presence.
A. That he had a substantial amount of cash.

Q. And was there any talk— As of what time? What time was he referring— As of what time? A. I don't know.

Q. What? A. I don't know.

Q. Was there any talk of gifts? A. No.

Q. Did the mention of the name Coan come up at that conference? A. Coan?

Q. Yes. A. Yes, I believe so.

Q. Can you remember what was said with reference to him? A. That either Mr. Smith was employed by Mr. Coan or Mr. Coan was a partner of Mr. Smith.

Q. Can you remember anything else? A. No, I don't recall anything else.

Q. Now coming to the events back in June, did you on some date subsequent to this telephone conversation and conference between McMahon and yourself receive from the defendant a net worth statement and a check? A. I did.

Q. In what amount was the check? A. \$15,000.

Q. And you also received, did you not, from him the net worth statement you have in front of you? A. I did.

Q. What did you do after he brought it to you? A. I gave it to Mr. McMahon.

Q. You went over to the Treasury Office and saw Mr. McMahon? A. And I gave it to him.

Q. Was there any conversation between you and Mr. McMahon that you recall as of that occasion? A. No, I don't recall any conversation.

Q. About how long do you think you were there in Mr. McMahon's office, if you remember? A. Not too long.

Q. Did you have further conversations with Mr. McMahon with reference to this case after your having de-

livered the check and net worth statement to him? A. On June 15th.

Q. Please state the occasion and what the conversation was. A. I had received a letter from Mr. McMahon in which he had returned the check for \$15,000 that I had given him from Mr. Smith. I caled him on the phone and I asked him what the story was. Mr. McMahon told me that the case was out of his hands, and he was sorry it turned out this way, and he referred me to Special Agent Ierardi.

Q. The gentleman right here in court? A. That's right.

Q. Now on some subsequent date did you have further conversation with Mr. McMahon? A. I did.

Q. Was that about one month later? A. I don't know the exact date, sir.

Q. Who was present at that conference? A. Special Agent McMahon, Cortese and Revenue Agent Toohey.

Q. And that was also held in the office of the Intelligence Unit, was it? A. Yes, sir.

Q. Did you and Mr. McMahon have some conversation on that occasion? A. We did.

Q. Please state what was said at that time. A. In the presence of Special Agent Cortese, Toohey, I told Mr. McMahon that I was of the opinion that this case was closed and that if I had any doubt in my mind that I would never have given a signed statement to the Agents, and that if I felt that they were going to use this net worth statement they would never have received it from me. In substance, that's what I told them. It was a rather heated argument, I guess.

Mr. Garrity: No further questions.

Cross-Examination by Mr. Miller.

X-Q. Mr. Delaney, you had been employed in the Intelligence Unit of the Treasury Department before you under-

took the Smith matter, is that right? A. Yes, sir.

X-Q. And as an Agent in the Intelligence Department, what did your duties consist of? A. My duties consisted of investigating applicants for employment with the Treasury Department, investigating tax cases.

X-Q. In the latter part of your period of employment you were engaged solely in the investigation of income tax fraud cases, is that correct? A. That is correct.

X-Q. And as you commenced your duties in connection with the investigation of tax fraud cases, were you required to take a course or a training period by the Treasury Department? A. Before I went into the tax—

X-Q. Before you started to perform your duties as a Special Agent? A. No, I didn't take that course.

X-Q. Well, did you take it at some time while you were there? A. Before entering the service of the Intelligence Unit I did.

X-Q. Before entering the service of the Intelligence Unit you took a course? A. That's right.

X-Q. What was the nature of that course? A. How to investigate cases, I imagine.

X-Q. How much time did you spend on the course? A. I think it was two or three weeks.

X-Q. You got a pretty thorough training on the investigation of income tax fraud cases, is that right? A. I got a training.

X-Q. And then you did this income tax fraud investigation yourself, is that right? A. That's right.

X-Q. And then some time in 1949 you left the employ of the Government and you went into private practice, is that right? A. That is correct.

X-Q. Are you an accountant? A. Yes, sir.

X-Q. And then Mr. Smith came to you with his tax case, is that right? A. That's right.

X-Q. Some time around the end of 1949? A. Yes, sir.

X-Q. And had you ever represented him previously?

A. No.

X-Q. That was the first time you saw him? A. Yes, sir.

X-Q. After you saw him, you contacted Mr. McMahon, the Agent, and asked him to hold off on the case for a while, is that so? A. Hold off on the case?

X-Q. Well, did you ask him to hold up on the case? A. I told him—would he wait a while until I had a chance to talk to Mr. Smith.

X-Q. Did you ask him for some time within which to do that? A. No, specific time, as I recall it.

X-Q. Well, I suggest to you—did you say to him, "We are coming into the income tax season now. Will you wait until after March 15th?" Did you say something along those lines? A. Not prior to— I mean— I had a conference before that.

X-Q. With whom? A. This was while I started to work on this net worth statement. I did ask him for some little time during the tax season.

X-Q. You asked Mr. McMahon to give you some time? A. That's right.

X-Q. So you had no conferences with him concerning the details of this case from December up until about the 30th of April, is that correct? A. I wouldn't know offhand on that.

X-Q. Well, you may consult your diary to refresh your memory. A. Thanks. I had a conference with him on January 16th.

X-Q. January 16th. What took place at that conference?

A. It was still that he wanted some background to this news company. It was a general discussion.

X-Q. When was the next conference after that? A. This refers to conferences with Mr. Smith. I believe on March

7th—pardon me—March—I think it was around March the 7th.

X-Q. When was the first date that you came into the office, where Mr. McMahon was working, with Mr. Smith?

A. With Mr. Smith?

X-Q. Yes. The first conference between Agent McMahon, the taxpayer and yourself? A. April 30th.

X-Q. That was the only conference in which the taxpayer was present? A. That's right.

X-Q. Now at that conference Mr. McMahon asked certain questions of the taxpayer, is that right? A. That's right.

X-Q. You permitted or rather you offered no objection to the taxpayer answering those questions, did you? Did you offer any objection? A. Prior to the meeting I offered an objection, yes.

X-Q. But you acquiesced in allowing him to interrogate your client along certain lines? A. It was an informal discussion.

X-Q. You say that in the course of that discussion the question of cash on hand arose, is that correct? A. The question of cash on hand arose at various times.

X-Q. I'm now talking about this conference. A. I couldn't pinpoint it to one particular conference.

X-Q. Well, do you remember telling Mr. Garrity, a few moments ago, that on April 30th there was a talk of cash? A. That's right. There was always a talk of cash.

X-Q. And your answer to Mr. Garrity was that Smith said he had a substantial amount of cash. Do you remember testifying to that just a few minutes ago? A. Yes.

X-Q. That was on April 30th, is that right? A. Yes.

X-Q. Now do you remember testifying under oath in this Court in January and being asked a similar question? A. Yes, I believe I do.

X-Q. Do you remember what your answer was on that

occasion to the same question? A. No, I do not.

X-Q. I will try to refresh your memory, and ask you whether or not you recall Mr. Garrity saying to you:

"Now will you tell the Court whether or not there was some discussion of cash?"

The answer:

"There was in the taxpayer's mind, Mr. Smith, that he should be entitled to some cash."

Do you remember being asked that question and giving that answer? A. Yes.

X-Q. Do you want to change that answer? A. Some cash?

X-Q. Do you want to change the answer as I have just read it and, as you say, you gave it several months ago?

A. Will you read it again, please?

X-Q. I'll be happy to. A. Thank you.

"Q. Now will you tell the Court whether or not there was some discussion of cash?"

"A. There was in the taxpayer's mind, Mr. Smith, that he should be entitled to some cash."

A. That's right.

X-Q. You want that statement to stand? A. That's right.

X-Q. And I ask you if you recall the next question and answer; question by Mr. Garrity:

"Do you recall what he said?"

A. That he did have some cash."

Do you recall being asked that question and giving that particular answer? A. I do now, yes.

X-Q. And do you now want to change your answer to that question from the language that he did have some cash to the answer you gave Mr. Garrity a few minutes ago, that he had a substantial amount of cash? A. Well, possibly it's an interchange of words.

X-Q. I'm asking you now whether you want to change

the statement that you gave in January to the one you gave this morning? A. No.

X-Q. I mean just now. A. I don't want to change it.

X-Q. You want them both to stand? A. Sure.

The Court: We will take the afternoon recess here.

[Recess.]

X-Q. I believe at the time we took the recess we were discussing your present testimony in which you said that Mr. Smith had said he had a substantial amount of cash on hand. Now what is your recollection now as to exactly what Mr. Smith said at that interview with reference to the cash he had? A. That he had cash prior—

X-Q. That he had cash on hand? A. Yes.

X-Q. He didn't say how much? A. No.

X-Q. He didn't use the word "substantial"? A. I used the word.

X-Q. He didn't use the word "substantial," Smith didn't? Smith merely said he had some cash? A. That he had cash.

X-Q. That he had received some small gifts from Jim Coan from time to time, isn't that a fact? Isn't that what he said? Do you remember him saying it or not? A. I remember Mr. Coan's name coming up.

X-Q. Do you remember Smith saying to Mr. McMahon: "I used to get \$40 a week." Do you remember that question or, rather, that answer to a question? Do you remember Mr. Smith saying that when he worked for Coan, he got about \$40 a week? A. No, I don't recall.

X-Q. Do you remember McMahon saying to him, "How could you live on \$40 a week?" Do you remember that question? A. No, I do not.

X-Q. Do you remember whether or not Smith said, "Coan used to give me small gifts from time to time." Do you remember him making that statement? A. No, I don't recall that statement.

X-Q. Now you were asked about the entire conversation that you had with Mr. McMahon on the 11th of June, which is the day you brought to him the net worth statement in its completed form. Can you tell us now what your entire conversation with him was on that occasion? A. I handed him this net worth statement, and he asked me if it was the same as the rough copy that I had shown him previously. And I said, "Yes." He said, "Do you think Mr. Smith would mind signing it?" And I said, "I have a conference with Mr. Smith at one o'clock and I will ask him."

X-Q. That's all he said? A. I believe there was other discussion.

X-Q. And you picked up the net worth statement and you left is that right? A. That's right.

X-Q. He didn't say anything to you on that occasion about closing the case, did he? A. On this particular occasion?

X-Q. Yes, June 11. He didn't say anything to you about he will close the case, did he? A. I have a note here.

X-Q. Well, looking at your note, what is your recollection? A. It says here: Conference with McMahon on Smith. Stated that he would close the case in the usual way.

X-Q. When were these notes made? A. Usually at the end of the day, I believe.

X-Q. Now when you testified here back in January, do you remember whether you used that same diary to refresh your memory? A. No, I did not.

X-Q. You testified without the diary? A. Yes, sir.

X-Q. Now you handled net worth cases, had you not, in connection with your investigation duties as a Special Agent? A. Net worth?

X-Q. Net worth cases, so-called? A. No.

X-Q. You never did? A. Not as a Special Agent, no, sir.

X-Q. You were familiar, were you not, with a method in

which net worth cases were handled from an investigative standpoint in the Department, were you not? A. Yes, sir.

X-Q. You knew from your own experience in the Department and the instructions and your courses that when no books and records were kept it was customary in connection with the tax case to submit a net worth statement on behalf of the taxpayer? Is that so? A. To submit one?

X-Q. Yes. It was customary for the taxpayer, if he was seeking a settlement or a determination of his tax liability, to submit a net worth statement? A. Well, I have never had one submitted, no, sir.

X-Q. Did you ever handle any net worth statement cases? A. I told you before, No.

X-Q. You want us to understand that the cases you had were not net worth cases? A. That's right.

X-Q. The cases you had were based upon establishing the exact income by showing unreported income, is that correct? A. May I have that question again, please?

X-Q. You were working, you said, on cases that involved an approach different from the approach on the net worth basis, is that correct? A. That's right.

X-Q. And in those cases, it wasn't necessary to have a net worth statement, is that correct? A. I said I never used it.

X-Q. But in this particular case there were no books or records, were there? A. Not to my knowledge, no, sir.

X-Q. Did you ask for them? A. Yes.

X-Q. What were you told? A. That there were none available.

X-Q. Did you have some theory in your mind as to how you should present this case to the Tax Department. A. No.

X-Q. Did you have some method of approaching this problem? A. Not at that time, no.

X-Q. Some time between the time you were retained in

the case up until June 11, didn't you decide that in order to straighten out this matter you would have to submit a net worth statement? A. I didn't decide it.

X-Q. Did you feel you could determine this case without submitting a sworn statement of the taxpayer's assets and liabilities at the various years? Did you honestly feel you could do that? A. Did I?

X-Q. Did you feel— A. I had no opinions on it at all. I was instructed to prepare a net worth statement.

X-Q. My question is did you feel you could straighten out this case or close it out without submitting a net worth statement? A. I had no opinion on it.

X-Q. Do you have any opinion now? A. Now? The statement is in.

X-Q. Well, isn't it a fact, Mr. Delaney, that where there were no books and records kept in this case you, as a Special Agent, and as an accountant in an attempt to straighten this matter out knew in your own mind that it would be necessary to submit a net worth statement for the Government to check over? Didn't you know that, Yes or No? A. I can't answer it Yes or No, Mr. Miller, because I was asked to prepare the net worth statement.

X-Q. My question is whether or not you knew, yourself, whether or not a net worth statement would have to be submitted in order for this case to be considered? A. I had no opinion at the time.

X-Q. You have no opinion. That's how you want to leave it? A. That's right.

X-Q. And yet you kept asking Mr. McMahon to give you a little more time on this case, is that correct? A. That's right.

X-Q. And the purpose of time was in order to get certain figures, such as assets, liabilities and other items, is that correct? A. That's right.

X-Q. And those are the only figures you submitted?
A. That's right.

X-Q. You didn't submit any profit and loss statement?
A. No, sir.

X-Q. And when you finally had these figures assembled in draft form you showed them to Mr. McMahon, is that right? A. Because he asked for the statement.

X-Q. You showed them the figures, is that right? A. Yes.

X-Q. And you brought them back on June 11 and showed them to him again? A. That's correct.

X-Q. And you went back to your client and had him sign it and brought in a check for \$15,000, is that right. A. Yes, sir.

X-Q. \$15,000 wasn't the amount of the tax, was it? A. It was approximately, I believe, that amount.

X-Q. Hadn't you made a computation of it? A. I did.

X-Q. What was your figure? A. I don't recall.

X-Q. Where did this \$28,000 figure come from? A. I believe—I haven't seen any papers for approximately two years—I believe it's the tax and the fraud penalty.

X-Q. I show you these work papers here and ask you if these are your work papers? A. Those are my papers.

X-Q. I show you attached to the work papers these figures here taken off from an adding machine and ask you whether or not those figures were prepared by you or under your direction? A. They were prepared by me.

X-Q. And those figures show a total of \$28,437 and—
A. —43 cents.

X-Q. What does this mean (indicating on paper)?
A. Total.

X-Q. You caused those figures to be prepared? A. Yes, sir.

X-Q. And those figures represent what you felt was a computation of the tax liability for four of the tax years

based upon the net worth statement, is that correct?

A. Tax and penalty.

X-Q. Tax and penalty? A. Yes, sir.

X-Q. So that you were satisfied from the net worth statement which you prepared that there was due the United States approximately \$28,000 in taxes, interest and penalty, is that correct? A. Satisfied? No, I wasn't satisfied.

X-Q. Well, you made the computation, didn't you? A. That's right.

X-Q. It was correct, wasn't it? A. That's right, based on the figures in the net worth statement.

X-Q. And the figures in the net worth statement were figures given to you by the taxpayer, isn't that right? A. No, there are figures missing.

X-Q. Would the figures or missing figures increase the amount of the tax liability or decrease it? A. I believe it would decrease it.

X-Q. When did you learn of those missing figures? A. When did I learn?

X-Q. Yes. A. I didn't learn.

X-Q. How did you know there were missing figures? A. Because from the beginning of the investigation I felt there was something under controversy.

X-Q. You had a talk with the taxpayer, had several conferences with him before you got him to sign this statement, didn't you? A. That's right.

X-Q. You asked him to give you all of his assets, did you not? A. That's right.

X-Q. And you made it a joint net worth statement, is that correct? A. The heading is "Joint," yes.

X-Q. You told him to include everything that he had, is that right? A. That's right.

X-Q. Then when you gave it to him on June 11 or 12 you

asked him to have it signed under oath, is that right?

A. That's right.

X-Q. And then he brought it back to you the next day with his oath on it, is that correct? A. That is correct.

X-Q. So that when you say you didn't know what the tax was, you mean that you don't know if it was \$28,000 or not, is that correct? A. I said based on those figures in the net worth statement.

X-Q. But the \$28,000 figure that we are talking about is the figure that you put on your work sheets, is that correct?

A. That is correct.

X-Q. Now you say that Mr. McMahon spoke to you after you got the letter saying that it was being returned, the check was being returned, and you stated that he said he was sorry, is that correct? Do you remember saying—you stated he was sorry? A. Yes.

X-Q. Well, as a matter of fact, when you testified here a few months ago you gave us a slightly different version of that conversation, didn't you? A. I don't recall.

X-Q. Well, do you remember in response to a question by Mr. Garrity in which you were saying:

"Q. Did you call Mr. McMahon on receipt of that letter?

"A. Yes, I did."

Do you recall that question and answer? A. Yes, sir.

X-Q. Do you recall the next question:

"Q. Can you recall the conversation you had with Mr. McMahon on that occasion?"

And I will read you your answer:

"A. Well, I believe I called up and I asked him what the story was, that we submitted a net worth statement and I received this letter, and I believe Mr. McMahon said it was out of his hands, that he had nothing to do with it."

Do you remember making that answer? A. Yes.

X-Q. In that answer there was nothing said about being sorry that the case wasn't closed out, was there? A. No, sir.

X-Q. Now, as a matter of fact, Mr. Delaney, you knew from your own experience as a Special Agent in the Treasury Department that the Special Agent handling the case had no authority to close out the case? A. No, I did not.

X-Q. You didn't know that? A. No, sir.

X-Q. Didn't you know that he had to take the matter up with his superiors? A. No, not always.

X-Q. Didn't you expect from your own experience as an Agent in the Department that he could not close a case merely by tendering a net worth statement and a check? A. I did not know that.

X-Q. Didn't you understand and believe from your experience that he would have to conduct some form of investigation to determine whether or not the facts contained in that net worth statement were true or false? A. Not when he accepts the check with the net worth statement.

X-Q. You mean you want his Honor and the Jury to believe if you gave a net worth statement and a check that the Agent had the authority to close it out without doing anything further? Is that the impression you want to leave? A. I don't know what the Agent was doing or what he was going to do.

X-Q. Did you expect that that is what would happen? A. Yes.

X-Q. You thought that just giving him the net worth statement and the check would end the case, is that correct? A. In my mind.

The Court: Did you ever close out a case like that?

The Witness: Yes, sir, I did—not on a net worth basis, no, sir.

X-Q. Who was your group chief when you were handling tax cases? A. I had two; one by the—

X-Q. How many cases did you close out during the time you were Special Agent? A. Approximately five or six.

X-Q. Did you close any one of those five out without consulting with your group chief? A. Yes.

X-Q. How many? A. I was handed cases to write up without consulting anybody.

X-Q. Now you had a talk with Mr. Cortese and Mr. McMahon and Mr. Toohey some time later, isn't that a fact? A. That is correct.

X-Q. And that's the talk when the tempers were kind of high, is that correct? You used some expression—it was kind of heated, is that correct? A. That's right.

X-Q. Isn't it a fact that you were told by them that they were sorry you got the impression that this was a voluntary disclosure? A. They didn't say that.

X-Q. Didn't they say to you, "We are sorry you got the impression this was a voluntary disclosure"? Whether they said that or not? A. Mr. McMahon said it.

X-Q. Mr. McMahon said to you, "I'm sorry, Bill, that you got the impression that this was a voluntary disclosure." He did say that, didn't he. A. That's right.

X-Q. Not that he gave you the impression but that you got the impression—those were his words? A. He gave me the impression.

X-Q. Didn't he say to you, "I'm sorry you got the impression"? A. That's what he said, but I believe he gave me the impression.

X-Q. Well, he said to you, "I'm sorry you got the impression of a voluntary disclosure," is that right? A. That is what he said.

X-Q. Do you recall some time in the course of the interview of April 4th with Mr. Smith, Agent McMahon asking

him about the Falmouth Bowling Club? A. Yes.

X-Q. He asked him about the activities of the Club? A. Yes.

X-Q. And do you remember him asking Mr. Smith: "Where did you get the money to buy the Club?" Do you remember that question? A. I believe I do, yes.

X-Q. Do you remember Mr. Smith saying to him: "Part of the cash that I used to purchase the Club came from income that I didn't report from my wire service business"? Do you remember Mr. Smith saying that? A. No, that isn't the impression I got, Mr. Miller.

X-Q. You don't recall that answer? A. No, sir.

X-Q. And on this conference of April 24 or whenever it was with the taxpayer, you said there was no talk at that time about any gifts, is that correct? A. Not to my knowledge.

X-Q. You don't know whether this check for \$15,000 was full payment or partial payment or what of the taxpayer's liability? You didn't know at the time you submitted the check for \$15,000 whether it represented the full amount of his tax or a portion of it? A. I felt that it was the greater portion of the tax.

X-Q. You felt it represented the greater portion of the tax? A. That's right.

Mr. Miller. That's all.

Mr. Garrity: No further questions.

Mr. Rowe.

FOURTH DAY.

Lobby,

Friday, June 5, 1953,

10:00 A.M.

The Court: I want the record to show the defendants' request for instructions were left at my office after I had

gone home last night, and I haven't had an opportunity to read them. I am going to direct a verdict on the fifth count.

Does the Government care to take a position on this question?

Mr. Miller: I don't care to be heard on the fifth count. I'm not going to take up your time.

Mr. Garrity: I would like the record to show one fact with reference to the delivery of instructions myself, if I may, and that is that they were filed with the Clerk subsequent to your Honor leaving the courtroom yesterday but before the Clerk left the courtroom, and they were left with him at that time.

The Court: Well, you didn't tell me. I just haven't had a chance to read them.

Mr. Garrity: I understand, but I think I probably complied with the rule.

The Court: I don't think it's a fair compliance.

Mr. Garrity: I have one point I would like to raise. I would like to request your Honor to order the blackboard, which has on it all of the computations that Mr. Toohey made on the basis of the evidence that went in against Eva and against my client, turned back or removed from the view of the Jury during the course both of my argument and the argument of the Government.

The Court: Why?

Mr. Garrity: Because, first, I claim that that is a joint computation which has no business in the case at all. Secondly, because it is based almost certainly for the most part on evidence that has been admitted only against Eva.

The Court: He may want to use it in his arguments.

Mr. Garrity: It was admitted against—evidence admitted against Eva not my client. It's not evidence and it's highly prejudicial against him.

The Court: I will let it stand.

Mr. Garrity: I object, for the record.

The Court: Before counsel start their arguments, I want to state there are five separate counts here, there are five different crimes charged, one in each year.

I am going to acquit the defendant on the fifth count. That is the year 1950, so you will not consider that. The reason I am doing it is the evidence was that all of the improvements at the Falmouth Bowling Club were paid for by the corporation. Now since they were paid for by the corporation, even though Smith owned the corporation, those payments might have come from corporate income because in a restaurant such as that you know they do take in money. So if you deduct that \$36,000-odd from his net worth in 1950 then you see it has not increased at all during that year. And for that reason I acquitted him, but that will have no bearing on the four other counts.

CHARGE TO THE JURY.

The Court: Well, at the outset the two alternatives are excused.

This is your first criminal case, I think, and at the outset I want to call to your attention that in the civil cases which you have heard I have charged you that the burden that is on the plaintiff is to prove his case by the greater weight of the evidence, and that is a correct law in a civil case, but in a criminal case the Government is under the burden of proving beyond a reasonable doubt, and I will explain to you in a few moments what a reasonable doubt is, but there is that distinction. There is a greater weight of evidence required in a criminal case than in a civil case.

You are the judges of the facts. You are the ones who will find what the facts are in this case, and I hope that nothing I say to you will indicate that I am trying to persuade you one way or another because I do not intend to

and I do intend to leave the fact-finding entirely to you. And as I will leave that position to you, I want you to leave the law to me. If I am wrong in any law that I give you there is a Circuit Court of Appeals above for the very purpose of correcting errors that we make down here in law. If you commit errors of fact, those will never be corrected.

Now referring again to the burden of proof, I am going to read to you something that the Supreme Court has said:

"In the first place, the law presumes that persons charged with crime are innocent until they are proven by competent evidence to be guilty. To the benefit of this presumption of innocence the defendant is entitled; and this presumption stands as his sufficient protection unless it has been removed by evidence proving his guilt beyond a reasonable doubt. The burden is on the Government, before the defendant can be convicted, of establishing every essential element of the crime charged, beyond a reasonable doubt. A reasonable doubt of guilt is a doubt growing reasonably out of the evidence, or the lack of it. It is not a capitious doubt; not a doubt engendered merely by sympathy for the unfortunate position of the defendant, or a dislike to accept the responsibility of convicting a fellow man. If, having weighed the evidence on both sides, you reach the conclusion that the defendant is guilty to that degree of certainty that would lead you to act on the faith of it in the most important and critical affairs of your life, you may properly convict him. Proof beyond a reasonable doubt is not proof to a mathematical demonstration. It is not proof beyond the possibility of mistake. If such were the standard of evidence required, most criminals would go unwhipped of justice."

There is another rule of law that I want to call to your

attention and that is this: That a defendant is not required to take the stand. He has a right to remain mute and to stand or fall on the Government's case, because it is their burden of proving him guilty, and he may well elect to stand for many other reasons upon that Constitutional right. So please cast, draw no inference from the fact that this defendant did not testify.

Now there are four separate counts charged here, and that means that there are four separate crimes, and you should attack them as such, examining each year to see whether this defendant did what they charge him with doing. Did he in each of these years or in any of them attempt to evade a tax?

Now circumstantial evidence is just as good as direct evidence if it accomplishes the purpose for which the two were given: if it establishes the fact that is charged.

In a business such as this defendant is alleged to have engaged in and in which books were not kept, you can see how difficult it is to get direct evidence of receipts and failure to pay, and so they have to resort to circumstantial evidence, and the Agents have gone out and have inquired into such transactions as they could find that this defendant had engaged in and they have by the circumstances of their inquiries submitted missing information that would have been in the books ordinarily. And if you are satisfied that the evidence they gave you point to the receipt of monies that he failed to report and your decision excludes all other reasonable theories or hypotheses, then you would be justified in convicting.

Now the last thing you should leave out of the courtroom is your own good common sense. You have lived some years. You have met people. You have seen situations and in short you probably all have good judgment.

Now the credibility of witnesses is a thing that you should

File this return with Collector of Internal Revenue on or before March 15, 1947. Any balance of tax due (item 9, below) must be paid in full with return. See separate instructions for filling out return.

FORM 1040
Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN
FOR CALENDAR YEAR 1946

1946

or fiscal year beginning _____, 1946, and ending _____, 1947

EMPLOYEES.—Instead of this form, you may use your Withholding Statement, Form W-2, as your return, if your total income was less than \$5,000, consisting wholly of wages shown on Withholding Statements or of such wages and not more than \$100 of other wages, dividends, and interest.

Name DANIEL AND EVA SMITH
(PLEASE PRINT. If this return is for a husband and wife, use both first names)
ADDRESS 16 ST JAMES ROAD
(PLEASE PRINT. Street and number or rural route)
Shrewsbury Worcester MASS. 13
(City or town, postal zone number) (County) (State)
Occupation _____ Social Security No. 027-09-0634

Do not write in these spaces

File Code
Serial No. 8034943

District
(Cashier's Stamp)
RECEIVED

MAR 6 1947

COLL INT H
DIST. MASS

Your Exemptions

List your own name.
If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband).

List names of other close relatives (as defined in instruction 1) with 1946 incomes of less than \$500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

1.	Name (please print)	Relationship	Name (please print)	Relationship
Your name	DANIEL SMITH	XXXXXXXXXX		
	EVA	WIFE		
	JANET	DAUGHTER		

Your Income

Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1946, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues,

insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see instruction 2.

2.	Print Employer's Name	Where Employed (City and State)	Amount
	self-employed		\$

Enter total here → \$

3. Enter here the total amount of your dividends

4. Enter here the total amount of your interest (including interest from Government obligations unless wholly exempt from taxation)

5. If you received any other income, give details on page 2 and enter the total here

81 13
312 96 53

be concerned with. As an instance, Agent McMahon and Mr. Delaney tell different ideas, tell different stories of what transpired. Well, now, sometimes if you can find an established fact, something that there is no question about, you are able to test the so-called conversation or the other evidence by comparing it or fitting it into that established fact so that you can arrive at a fair decision on who is to be believed.

Now one of the first questions that I'm going to submit to you, since it has been raised, and I told you before I was going to do it, is the question of how this net worth statement was obtained from the defendant. The defendant alleges that through Delaney he was promised that the case would be closed if he would get the statement. The other side says, "No, that's not so."

You will have certain records. Whether or not the Agent put in the first letter or a copy of it that he sent out to this man, I don't know, but if he didn't, he testified to some date. Test their conduct on and after that date. Fit it in with their conversation, and bear in mind the question isn't here: Did Delaney misunderstand him? That's not the question. The question is: Was trickery, fraud or deceit practiced upon Smith, Delaney to obtain the statement? If you find there was, then you would reject all of the evidence that is contained in that statement and all evidence that was obtained through it.

If, on the other hand, you find that this was an afterthought, this allegation of deceit or fraud, you find that from the examination of what actually happened, then of course everything in that statement and every other bit of evidence you have heard can be used against this defendant.

Now the crime charged has really three elements to it. It is the attempt, the willful attempt to evade a tax. Now I don't think there is anything very difficult about these

things. It means a willful, intentional attempt to evade a tax.

As I have said to you, the Government has set out to show you through circumstantial evidence that this crime or these crimes have been committed. They are using what is known as a net worth theory and properly used under that theory you must first establish a base net worth, a base valuation of an individual. From all the facts you can find, if you can get to that, you have got to be able to set out that this man was worth so many dollars on a certain date. From there you go to the next year. Let's say that you start his net worth on December 31 and it's X dollars. Now on December 31 of next year what was his net worth? It's X plus something. Was that plus something different than he purported? Was it substantially more? In that way you arrive at whether or not there was a willful attempt to evade the tax.

Bear in mind that net worth means just what it says: on a given date what your worth was. If, for instance, a man on January 15th had \$10,000 in stocks and bonds and then a month later he sold them for \$10,000 and kept \$10,000 in cash for awhile, then later on bought a \$10,000 house, and then later on sold that again for \$10,000, and it is now the end of the year, of course, he hasn't made a cent. He hasn't increased his value. He has just changed the form of his value from one to another. So examine his value at a given time, add a year to it, and do that successively in each of the four crimes charged.

Now they also have to prove under the net worth theory the possible source of income. You hear of the activities of this defendant and his associates, his wife, brother-in-law, and you are to find as reasonable people whether or not he had a possible source of income. Having decided that in setting your net worth you will include all the property you

find he owned, that he owned as distinguished from possibly having in his name.

The question here is very simple and you are not to go off on tangents and get mixed up with whether this man is a bootlegger or whether he is a bookie or anything else. It's a simple question that you are asked to answer, and you are to answer whether or not in each of these years this man attempted to evade his income taxes.

If you find that that statement was voluntarily given, even if it was just a hope, without fraud or deceit, then you use every bit of evidence in this case to answer the question. I don't think there is anything more I can say to you that would help you. If there is anything that comes up in the jury room that is confusing, just have your Forelady send a letter to me, a note with the question you want answered. If it is proper I will call you back and answer it.

I will now see counsel for suggestions of error or omission.

[Conference at the bench between Court and counsel as follows:

Mr. Miller: I have none, your Honor.

Mr. Garrity: I have either three or four, your Honor. The first is your statement, as I understood it, that the Agents in the course of their investigation supplied the missing information which would ordinarily be obtained from the defendant's books.

Now I don't believe that your Honor meant to say quite that but I do object to that language for the reason that—

Mr. Miller: It can be rephrased.

The Court: "Attempted to," I thought I said.

Mr. Garrity: I thought you said "supplied." That's my objection, your Honor.

A more fundamental objection—

Mr. Miller: "Made an investigation to find the information."

Mr. Garrity: A much more fundamental objection of mine is to what I understood to have been your Honor's statement. After having discussed the net worth statement I think you said: "If you find it was not the result of trickery, deceit, and so forth—" then I have—"the net worth statement, as well as every other bit of evidence which you have heard is admissible against him—" and I would close the quotes there.

Now I interpret that to mean your Honor has ruled that the evidence which was admitted only against Dan—excuse me, only against Eva during the course of the trial—

The Court: I will correct that.

Mr. Garrity: As I understand it, your Honor, only a small portion of the evidence in this case here was admitted in the first instance against Daniel, that where the Government—

The Court: All right. I will change it.

Mr. Garrity: Thank you. Now also, I understood you to say that if there was an increase in his net worth of more than what he reported on his tax return, then he could be found guilty of tax evasion.

The Court: State that again.

Mr. Garrity: I believe you said: If there was an increase in his net worth more than what he reported on his tax return, then he can be found guilty of tax evasion. That's the end of my quote.

Now in that connection I think your Honor owes the defendant a charge of this nature: That an increase in net worth does not mean income; it could be a gift or it could be Mrs. Smith's money and that until the Government eliminates those hypotheses as not being reasonable, then until that time the jury may not infer that an increase in his net worth is income.

Mr. Miller: May I be heard?

Mr. Garrity: Finally, sir, I would also, in connection with an earlier point, request that—this business about all the evidence being admissible against him—I would like to request in that connection that your Honor instruct the jury that the evidence of the bank accounts is not admissible under any theory against Daniel in view of the status of the proof, and also that the evidence of ownership of other assets by Eva is not admissible against Daniel until there is a link established.

The Court: No. He shows a course of conduct—

Mr. Miller: I wanted to make a correction. He objects—you say “increase in net worth is a fraud.” If you are going to correct that, I would say: If there are increases which resulted in income, under the rules I have given—

Mr. Garrity: One more, your Honor. I request that—

The Court: I'm not receiving requests.

Mr. Garrity: With reference to your Charge, I think you should state that the evidence has not been admitted against Daniel.

(End of Conference at the bench.)

The Court: Bear in mind that we are trying only the case against Mr. Smith and bear in mind that once or twice during the progress of the trial I told you that certain evidence was being admitted against one person or against the other, so that you are not to consider any of the evidence that was put in against Eva but only such evidence as applied to Daniel Smith.

Counsel called my attention to the fact when I was explaining circumstantial evidence that I said that the Agents went out and supplied the figures that would have normally appeared on the books. What I meant was that the Agents went out to investigate to find out what figures should have been on the books, if there should have been any.

Now with those corrections I will give the case to you.

[Jury retires to deliberate at 11:25 P.M.]

[Conference at the bench between Court and counsel as follows:

Mr. Garrity: I object to your failure to state—the increase in his net worth—that the Government has to eliminate the increase in his net worth on the theory it might have been Eva's money.

The Court: Wait a minute. The jury has left the courtroom. Do you have a request to that effect here?

Mr. Garrity: Yes, your Honor, and not only that but that was one of the three things your Honor said he was going to correct.

The Court: I did not. He said he wanted to be heard.

Mr. Garrity: So long as my objection to your failure to give more than what you did is concerned, I wanted it entered.

Mr. Miller: You mentioned reasonable hypotheses. You don't have to put everything into the one sentence. You can use three sentences.

(End of conference at the bench.)

(Jury returns to the Court Room at 12:15 P.M.; defendant present with counsel.)

The Clerk: Members of the jury please rise. Madam Forelady, has the jury agreed upon its verdict?

The Forelady: Yes, they have.

The Clerk: What say you, Madam Forelady? Is Danie' L. Smith guilty or not guilty on Count 1?

The Forelady: Guilty.

The Clerk: Count 2?

The Forelady: Guilty.

The Clerk: Count 3?

The Forelady: Guilty.

The Clerk: Count 4?

The Forelady: Guilty.

The Clerk: Madam Forelady and members of the Jury,

hearken to your verdict as the Court has recorded it. On Counts 1, 2, 3 and 4 of this Indictment you find Daniel L. Smith guilty. So say you, Madam Forelady; so say you all, members of the Jury.

The Court: Thank you very much. You are excused until Tuesday morning at 10 o'clock.

(Whereupon at 12:20 p.m. the Court was adjourned.)

AFFIDAVIT

[Filed October 1, 1953.]

I, Mary Lou DuBois, of Boston, Massachusetts, being duly sworn, hereby depose and say that I am employed as a secretary by the law firm of Maguire, Roche & Garrity of Boston; that I attended the proceedings in the above-entitled case in Courtroom I, Federal Building, Boston, Massachusetts on Friday, June 5, 1953; that during the arguments of counsel for the defendant Daniel L. Smith, and during the charge to the jury for the Government, two blackboards were in full view of the jury; that at 3:00 o'clock on the afternoon of June 5, 1953, I returned to the courtroom accompanied by John F. Davis, deputy clerk, and, together with W. Arthur Garrity, Jr., attorney for the defendant Daniel L. Smith made copies of the contents of said blackboards, whose demensions I measured and were 3' 9" by 5'; that after said copies were made, I compared them with the contents of the blackboards and they are accurate and complete copies of the same; I kept said original copies in my possession until I transcribed said original copies (made on unlined paper) to the papers attached hereto as Exhibits A and B and made a part hereof; that said Exhibits are accurate and complete copies of said original copies which are in the case file in the office of Maguire, Roche & Garrity.

(s) MARY LOU DuBOIS

Affidavit.

Net Worth	Dec. 31					
<i>Assets</i>	1945	1946	1947	1948	1949	1950
Cash in Banks	\$8,058.58	42,988.61	80,482.73	69,300.92	42,878.72	27,461.66
Securities						
D. L. Smith	.....	.....	.....	3,882.96	3,882.96	.....
E. Smith	.....	.....	9,280.21	37,602.57	35,673.79	23,727.87
Valley Trust Co.	.....	.....	.....	.....	30,000.00	30,000.00
Taylor Drug Co.	5,618.39	4,015.28	2,741.07	2,900.25	3,256.82	3,087.89
Falmouth Bowling Club	.....	.....	.....	.....	40,000.00	40,000.00
U. S. Gov't Bonds	.....	3,750.00	3,750.00	3,750.00	3,750.00	3,750.00
John Hancock	.....	.....	.....	.....	37,039.64	41,339.64
Real Estate	18,600.00	43,577.00	42,954.00	71,962.09	101,856.09	130,239.30
Furniture	2,000.00	2,000.00	2,000.00	4,000.00	9,000.00	24,469.18
Autos	2,000.00	3,000.00	3,000.00	4,678.70	4,678.70	4,678.70
Mink Coats	.....	.....	.....	.....	3,750.00	3,750.00
Total	36,276.97	99,330.89	144,208.01	198,077.49	315,766.72	332,504.24
<i>Liabilities</i>						
Worc. 5¢ Sav. Bk.	.....	.....	.....	.....	6,000.00	.....
J. A. Lelande	.....	32,500.00	31,500.00	30,500.00	29,500.00	28,500.00
Les. & H. Crane	.....	.....	.....	.....	40,000.00	36,000.00
Worc. Mech. Sav.	.....	.....	.....	.....	7,300.00	.....
J. H. Pray & Son	.....	.....	.....	.....	.....	1,661.88
Knowles Elec.	.....	.....	.....	.....	.....	556.60
Total	.....	32,500.00	31,500.00	30,500.00	82,800.00	66,718.48
Difference	36,276.97	66,830.89	112,708.01	167,577.49	232,966.72	265,785.76
		36,276.97	66,830.89	112,708.01	167,577.49	232,966.72
Increase in Net Worth		30,553.92	45,877.12	54,869.48	65,389.23	32,819.04

	Dec. 31					
	1945	1946	1947	1948	1949	1950
Peoples Sav. Bank	222.95	721.52	736.01	1,568.90	1,600.42	132.58
# 2	....	....	....	3,184.48	1,782.93	116.56
Worcester Fed. Sav.	....	....	10,020.80	10,272.87	5,405.49	5,473.05
#2	1,079.60	13,103.82	13,433.43	13,771.35	4,891.35	4,952.48
Guaranty Trust	....	2,000.00	6,017.24	1,054.73	1,075.41	1,096.50
Hampden Sav.	....	500.00	7,458.02	537.92	548.72	559.74
Worcester 5 Cents	1,704.23	8,029.81	8,167.79	8,331.95	6,430.86	518.91
Worcester County Trust Co.	....	95.81	397.32	747.45	534.47	738.16
War Bonds (116-110 5@1000 maturity)	....	3,750.00	....	....	....	....
Worcester County Inst.	1,514.88	8,004.60	8,133.75	8,297.23	3,684.00	3,756.20
Worcester Mechanics Sav. Bank	3,536.92	8,064.14	8,226.22	7,494.10	7,644.73	425.38
Bay State Sav. Bank	....	1,500.00	8,006.88	8,227.99	3,343.36	3,410.55
Mechanics Nat. Bk.	....	468.91	289.60	174.39	237.66	519.99
Springfield Nat. Bk.	....	....	5,023.34	5,073.52	5,123.95	6,174.63
Springfield Inst. for Sav.	....	500.00	4,513.33	564.04	515.37	586.93
	8,058.58	42,988.61	80,482.73	69,300.92	42,878.72	27,461.66

Schedule A.—INCOME FROM ANNUITIES OR PENSIONS

1. Cost of annuity (total amount you paid in) \$	4. Total amount received this year \$
2. Amount received tax-free in prior years	5. Excess, if any, of line 4 over line 3
3. Remainder of your cost (line 1 less line 2) \$	6. Enter line 5, or 3 percent of line 1, whichever is greater \$ (Attach separate schedule for each additional annuity or pension)

Schedule B.—INCOME FROM RENTS AND ROYALTIES

1. Kind of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule F)	4. Repairs (explain in Schedule G)	5. Other expenses (itemize in Schedule G)
BRICK BUILDING	\$ 4615 00	\$ 623 00	\$ 544 54	\$ 3441 46
Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5) \$ 6 00				

Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Farmers should obtain Form 1040F)

State (1) nature of business News Service; (2) business name UNION ASSOCIATES;
(3) business address 9 BARTLETT ST. WORCESTER, MA 01091

Do NOT include in this schedule cost of goods withdrawn for personal use or deductions not connected with business or profession.

1. Total receipts \$ 25350 00	OTHER BUSINESS DEDUCTIONS
COST OF GOODS SOLD	11. Salaries and wages not in line 4 \$ 4830 00
(To be used where inventories are an income-determining factor) (Enter the letters "C" or "M" on lines 2 and 8 if inventories are valued at either cost, or cost or market, whichever is lower)	12. Interest on business indebtedness
2. Inventory at beginning of year \$	13. Taxes on business and business property
3. Merchandise bought for sale	14. Losses (explain in Schedule G)
4. Labor	15. Bad debts arising from sales or services
5. Material and supplies	16. Depreciation, obsolescence and depletion (explain in Schedule F)
6. Other costs (explain in Schedule G)	17. Rent, repairs, and other expenses (explain in Schedule G) 16534 71
7. Total of lines 2 to 6 \$	18. Amortization of emergency facilities (attach statement)
8. Less inventory at end of year \$	19. Net operating loss deduction (attach statement)
9. Net cost of goods sold (line 7 less line 8) \$	20. Total of lines 11 to 19 \$ 21364 71
10. Gross profit (line 1 less line 9) \$	21. Total of lines 9 and 20 \$ 21364 71
	22. Net profit (or loss) (line 1 less line 21) \$ 3985 29

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exchange of capital assets (from separate Schedule D)
2. Net gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D)

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

1. Name and address of partnership, syndicate, etc. <u>Taylor Drug Store</u> Amount, \$ 670 19
2. Name and address of estate or trust <u>Pennacook, N.H.</u> Amount, \$
3. Other sources (state nature) Amount, \$

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

1. Name and address of partnership, syndicate, etc. <u>Taylor Drug Store</u> Amount, \$ 670 19
2. Name and address of estate or trust <u>Pennacook, N.H.</u> Amount, \$
3. Other sources (state nature) Amount, \$
4. Total \$ 670 19

Total income from above sources (Enter as item 5, page 1)

\$ 4661 45

Schedule F.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES B AND C

1. Kind of property (If buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis (do not include land or other nondepreciable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in computing depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
BRICK BUILDING	5-29-46	\$ 35600 00	\$	\$ 623 00	\$ 34977 00	33 1/2 yrs	32 1/2 yrs	\$ 623 00

Schedule G.—EXPLANATION OF COLUMNS 4 AND 5 OF SCHEDULE B, AND LINES 6, 14, AND 17 OF SCHEDULE C

1. Column or Line No.	2. Explanation	3. Amount	1. Column or Line No.	2. Explanation	3. Amount
17	RENT	\$ 408 00	17	Supplies	\$ 2340 25
17	Electricity	206 65	17	News Service	11245 00
17	S.S. TAX	48 30	17	Telephone	1788 00
17	UNEMPLOYMENT TAX	130 41	17	Janitor	220 00
17	REPAIRS	148 10	17	SERVICE	

B-4 See Attached List, 11/14/39 96 00

16-52983-1 ☆ GPO

SCHEDULE G

B-4 Building repairs	285.99
B-4 Elevator repairs	240.55
B-4 Roof repairs	18.00
B-5 Supplies	9.48
B-5 Janitor	35.00
B-5 Electricity	77.68
B-5 Coal	1079.65
B-5 Taxes	536.00
P-5 Rubbish Removal	8.00
P-5 Park service charge	.21
P-5 Interest	1606.26
P-5 Safety Box	12.00
B-5 Ads	36.80
E-5 Water	25.38
B-5 Tax Shovels, etc	22.00
P-5 Recording	3.00

Commissioner is prohibited from making an assessment and for sixty days thereafter.

(s) DANIEL SMITH,
Taxpayer.

(s) EVA SMITH,
Taxpayer.

[Seal²]

By
(s) GEO. J. SCHOENEMAN,
Commissioner of Internal Revenue.
By (s) C. J. K. 3/15/51

This consent may be executed by the taxpayer's attorney or agent, provided such action is specifically authorized by a power of attorney, which, if not previously filed, must accompany the consent.

If executed with respect to a year for which a JOINT RETURN OF A HUSBAND AND WIFE was filed, this consent must be signed by both spouses unless one spouse, acting under a power of attorney, signs as agent for the other.

If a consent form is executed by a person acting in a fiduciary capacity, such as executor, administrator, or trustee, such person must submit Form 56, "Notice to the Commissioner of Internal Revenue of Fiduciary Relationship," together with certified copy of letters of administration, letters testamentary, trust instruments, or court certificate.

If this consent is executed on behalf of a corporation, it shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which the seal of the corporation must be affixed. Where the corporation has no seal, the consent must be accompanied by a certified copy of the resolution passed by the board of directors, giving the officer authority to sign the consent.

Schedule D (File with Form 1040)

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

1949

SCHEDULE OF GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY

For Calendar Year 1949 or fiscal year beginning 1949, and ending 1950

NAME AND ADDRESS EVA AND DANIEL SMITH, 16 S. JAMES ST. SHREWSBURY, MASS.

(1) CAPITAL ASSETS

1. Kind of property (if necessary, attach statement of descriptive details not shown below)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (contract price)	5. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (attach schedule)	6. Cost or other basis and cost of subsequent improvements (if not purchased, attach explanation)	7. Expense of sale
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SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 6 MONTHS

			\$	\$	\$	\$

1. Totals	\$	\$	\$	\$	\$	\$
2. Net short-term gain or loss other than from partnerships and common trust funds (column 4 plus column 5 minus the sum of columns 6 and 7, of line 1)						\$
3. Enter your share of the net short-term gain or loss from partnerships and common trust funds						
4. Enter here the sum of gains or losses, or difference between gain and loss, shown in lines 2 and 3						\$

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 6 MONTHS

<u>See Attached List</u>			\$	\$	\$	\$
5. Totals	\$14770	\$	\$	\$12818	\$	\$17019

6. Net long-term gain or loss other than from partnerships and common trust funds (column 4 plus column 5 minus the sum of columns 6 and 7, of line 5)	\$1781	07
7. Enter the full amount of your share of the net long-term gain or loss from partnerships and common trust funds	None	
8. Enter here the sum of gains or losses, or difference between gain and loss, shown in lines 6 and 7	\$1781	07
9. Enter 50 percent of line 8. This is the amount to be taken into account in summary below	\$890	54

10. Summary of Capital Gains (use only if gains exceed losses in lines 4 and 9):		
(a) Net gain for 1949 (either the sum of gains or difference between gains and losses in lines 4 and 9)	\$	890 54
(b) Capital loss carry-over, 1944-1948 inclusive	\$	None
(c) If line (a) exceeds line (b), enter this excess here and on line 1, Schedule D, page 2, Form 1040	\$	890 54
(d) If line (b) exceeds line (a), enter the excess here and use line (c) to determine allowable loss	\$	
(e) Enter here and on line 1, Schedule D, page 2, Form 1040, the smallest of the following: (1) the amount on line (d); (2) net income (adjusted gross income if tax table is used) computed without regard to capital gains or losses; or (3) \$1,000	\$	
(f) Enter here the amount on line (d) plus any capital loss carry-over from 1944 which was not used against line (a) or in line (e)	\$	
(g) Subtract line (f) from line (d) and enter the remainder here. This is your capital loss carry-over to 1950	\$	

net income (adjusted gross income if tax table is used) computed without regard to capital gains or losses

(f) Enter here the amount on line (d) plus any capital loss carry-over from 1944 which was not used against line (a) or in line (e)	\$	
(g) Subtract line (f) from line (d) and enter the remainder here. This is your capital loss carry-over to 1950	\$	

11. Summary of Capital Losses (use only if losses exceed gains in lines 4 and 9):		
(a) Net loss for 1949 (either the sum of losses or difference between losses and gains in lines 4 and 9)	\$	
(b) Capital loss carry-over, 1944-1948 inclusive	\$	
(c) Total of lines (a) and (b)	\$	
(d) Enter here and on line 1, Schedule D, page 2, Form 1040, the smallest of the following: (1) the amount on line (c); (2) net income (adjusted gross income if tax table is used) computed without regard to capital gains or losses; or (3) \$1,000	\$	
(e) Enter here the amount on line (d) plus the amount of any 1944 capital loss carry-over not used in line (d)	\$	
(f) Subtract line (e) from line (c) and enter the remainder here. This is your capital loss carry-over to 1950	\$	

(2) PROPERTY OTHER THAN CAPITAL ASSETS

1. Kind of property	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (contract price)	5. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (attach schedule)	6. Cost or other basis and cost of subsequent improvements (if not purchased, attach explanation)	7. Expense of sale
			\$	\$	\$	\$
1. Totals			\$	\$	\$	\$
2. Total net gain or loss (columns 4 plus 5 minus the sum of columns 6 and 7). Enter on line 2, Schedule D, page 2, Form 1040						\$

See other side for instructions and computation of Alternative Tax

10-50254-1

CAPITAL ASSETS

1. Kind of Property	2. Date acq.	3. Date sold	4. Gross sales price	5. Depr.	6. Cost.	7. Expense of sale
Stock	12/8/47	1/21/49	2900.00	None	2409.71	32.60
"	1/30/48	1/21/49	288.75	"	220.00	3.22
"	3/10/48	1/21/49	3025.00	"	2296.65	35.55
"	2/1/48	1/21/49	1375.00	"	1140.63	17.48
"	12/12/47	1/21/49	2625.00	"	2170.75	23.83
"	2/10/48	1/21/49	1143.75	"	1015.00	15.40
"	2/5/48	4/5/49	1325.00	"	1216.00	20.48
"	12/17/47	4/5/49	1043.75	"	1212.50	10.91
"	2/17/48	4/5/49	1043.75	"	1137.50	10.92
Totals			14770.00		12818.74	170.19

10. Gross profit (line 1 less line 9) \$ 22. Net profit (or loss) (line 1 less line 21) 3774 00

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exchange of capital assets (from separate Schedule D)
2. Net gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D)

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

1. Name and address of partnership, syndicate, etc. Taylor Drug Store, Amount, \$ 772 24
2. Name and address of estate or trust PENNA CO. INC., N. H. Amount, _____
3. Other sources (state nature) _____ Amount, _____
4. Total 772 24

Total income from above sources (Enter as item 5, page 1) 3696 53

Schedule F.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES B AND C

1. Kind of property (If buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis (do not include land or other nondepreciable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in accumulating depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
Brick Building	5-29-46	\$35600 00		\$ NONE	\$35600 00	33 1/3 YR	33 1/3 YR	\$ 623 00
							3 70	

Schedule G.—EXPLANATION OF COLUMNS 4 AND 5 OF SCHEDULE B, AND LINES 8, 14, AND 17 OF SCHEDULE C

1. Column or Line No.	2. Explanation	3. Amount	1. Column or Line No.	2. Explanation	3. Amount
17	WIRE SERVICE	\$ 8450 00	17	MISCELLANEOUS	\$ 121 00
17	NEWS SERVICE	1583 25	17	SUPPLIES	466 20
17	RENT 300 Tel. 137907	1679 07	17	JANITOR CLEANING	708 00
17	ELECTRICITY	76 04	17	S.S. TAX	55 80
17	REPAIRS	55 98	17	UNEMPLOYMENT TAX	150 66

16-49254-1 ☆ GPO

Schedule G
LABOR + MATERIALS 541.60
INSURANCE 345.00
ELECTRICITY 29.70
BANK SER. CHARGE .80
COAL 488.38
WATER 6.30
INTEREST 821.88
TAXES 632.00

Schedule A.—INCOME FROM ANNUITIES OR PENSIONS

1. Cost of annuity (total amount you paid in).....	\$.....	4. Total amount received this year.....	\$.....
2. Amount received tax-free in prior years.....		5. Excess, if any, of line 4 over line 3.....	
3. Remainder of your cost (line 1 less line 2).....	\$.....	6. Enter line 5, or 3 percent of line 1, whichever is greater.....	\$.....
		(Attach separate schedule for each additional annuity or pension)	

Schedule B.—INCOME FROM RENTS AND ROYALTIES

1. Kind of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule F)	4. Repairs (explain in Schedule G)	5. Other expenses (itemize in Schedule G)
BRICK BUILDING	\$ 2639 00	\$ 623 00	\$ 541 60	\$ 2324 11
Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5)	\$ 2639 00	\$ 623 00	\$ 541 60	\$ 2324 11

Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Farmers should obtain Form 1040F)

(State (1) nature of business News Service; (2) business name UNION ASSOCIATES)

1. Total receipts.....	\$ 22100 00
COST OF GOODS SOLD (To be used where inventories are an income-determining factor) (Enter the letters "C" or "M" on lines 2 and 8 if inventories are valued at either cost, or cost or market, whichever is lower)	
2. Inventory at beginning of year.....	\$.....
3. Merchandise bought for sale.....	
4. Labor.....	
5. Material and supplies.....	
6. Other costs (explain in Schedule G).....	
7. Total of lines 2 to 6.....	\$.....
8. Less inventory at end of year.....	\$.....
9. Net cost of goods sold (line 7 less line 8).....	\$.....
10. Gross profit (line 1 less line 9).....	\$.....
OTHER BUSINESS DEDUCTIONS	
11. Salaries and wages not in line 4.....	\$ 5580 00
12. Interest on business indebtedness.....	
13. Taxes on business and business property.....	
14. Losses (explain in Schedule G).....	
15. Bad debts arising from sales or services.....	
16. Depreciation, obsolescence and depletion (explain in Schedule F).....	
17. Rent, repairs, and other expenses (explain in Schedule G).....	12746 00
18. Amortization of emergency facilities (attach statement).....	
19. Net operating loss deduction (attach statement).....	
20. Total of lines 11 to 19.....	\$ 18326 00
21. Total of lines 9 and 20.....	\$ 18326 00
22. Net profit (or loss) (line 1 less line 21).....	3774 00

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exchange of capital assets (from separate Schedule D).....
2. Net gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D).....

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

1. Name and address of partnership, syndicate, etc. <u>Taylor Drug Store,</u> Amount, <u>\$ 772 24</u>
2. Name and address of estate or trust <u>Pennaco Co. N. H.</u> Amount, <u></u>

File this return with Collector of Internal Revenue on or before March 15, 1948. Any balance of tax due (item 9, below) must be paid in full with return. See separate instructions for filling out return.

FORM 1040
Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN FOR CALENDAR YEAR 1947

1947

or fiscal year beginning _____, 1947, and ending _____, 1948

EMPLOYEES.—Instead of this form, you may use your Withholding Statement, Form W-2, as your return, if your total income was less than \$5,000, consisting wholly of wages shown on Withholding Statements or of such wages and not more than \$100 of other wages, dividends, and interest.

Do not write in these spaces

File Code **1343**
Serial No. **3024084**

Name **Daniel AND Eva Smith**
(PLEASE PRINT. If this return is for a husband and wife, use both first names)

ADDRESS **16 St. James Road**
(PLEASE PRINT. Street and number or rural route)

Jhrewsbury Worcester
(City or town, postal zone number) (County)

MASS 4
(State)

Occupation _____ Social Security No. _____

List your own name.
If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband).

List names of other close relatives (as defined in Instruction 1) with 1947 incomes of less than \$500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

Your Exemptions

1.	Name (please print)	Relationship	Name (please print)	Relationship
	Your name Daniel Smith	XXXXXXXXXX		
	EVA	WIFE		
	JANET	DAUGHTER		

Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1947, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues,

insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see Instruction 2.

Your Income

2.	Print Employer's Name	Where Employed (City and State)	Amount
		REVIEW	\$

3. Enter here the total amount of your dividends _____

Enter total here → \$ _____

*U.S. 1542
Gordon
6-2-54
JAN
Computation proved*

MASS 4
(State)

MASS 4
(State)

MASS 4
(State)

MASS 4
(State)

JANET

DAUGHER

Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1947, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues,

insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see instruction 2.

Your Income

2.	Print Employer's Name	Where Employed (City and State)	Amount
		REVIEW	\$
			Enter total here → \$
3.	Enter here the total amount of your dividends		
4.	Enter here the total amount of your interest (including interest from Government obligations unless wholly exempt from taxation)		28 79
5.	If you received any other income, give details on page 2 and enter the total here		76 61 45
6.	Add amounts in items 2, 3, 4, and 5, and enter the total here		\$ 40 79 27

How to Figure Your Tax

IF YOUR INCOME WAS LESS THAN \$5,000.—You may find your tax in the tax table on page 4. This table, which is provided by law, automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 3.

IF YOUR INCOME WAS \$5,000 OR MORE.—Disregard the tax table and compute your tax on page 3. You may either take a standard deduction of \$500 or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

Tax Due or Refund

7.	Enter your tax from table on page 4, or from line 12, page 3	\$ 528
8.	How much have you paid on your 1947 income tax?	
	(A) By withholding from your wages	\$
	(B) By payments on 1947 Declaration of Estimated Tax	396 00
		Enter total here →
9.	If your tax (item 7) is larger than payments (item 8), enter BALANCE OF TAX DUE here	132 00
10.	If your payments (item 8) are larger than your tax (item 7), enter the OVERPAYMENT here	
Check (✓) whether you want this overpayment: Refunded to you <input type="checkbox"/> ; or Credited on your 1948 estimated tax <input type="checkbox"/>		

If you filed a return for a prior year, what was the latest year? 1946

To which Collector's office was it sent? BOSTON, MASS.

To which Collector's office did you pay amount claimed in item 8 (B), above? BOSTON, MASS.

Is your wife (or husband) making a separate return for 1947? NO

If "Yes," write below: ("Yes" or "No")

Name of wife (or husband)

Collector's office to which sent

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of person (other than taxpayer or agent) preparing return)

(Date)

(Signature of taxpayer)

(Date)

(Name of firm or employer, if any)

(If this is a joint return of husband and wife, it must be signed by both)

Schedule A.—INCOME FROM ANNUITIES OR PENSIONS

1. Cost of annuity (total amount you paid in) \$	4. Total amount received this year \$
2. Amount received tax-free in prior years	5. Excess, if any, of line 4 over line 3
3. Remainder of cost (line 1 less line 2) \$	6. Enter line 5, or 3 percent of line 1, whichever is greater (but do not enter more than line 4) \$

Schedule B.—INCOME FROM RENTS AND ROYALTIES

1. Kind and location of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule F)	4. Repairs (explain in Schedule G)	5. Other expenses (itemize in Schedule G)
BRICK BUILDING	\$3694	\$623	\$269 93	\$3720 90
Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5) \$				\$4055

Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Farmers should obtain Form 1040F)

State (1) nature of business _____; (2) business name _____;
(3) business address _____
Do NOT include in this schedule cost of goods withdrawn for personal use or deductions not connected with business or profession.

1. Total receipts	\$	11. Salaries and wages not in line 4	\$
COST OF GOODS SOLD (To be used where inventories are an income-determining factor) (Enter the letters "C" or "M" on lines 2 and 8 if inventories are valued at either cost, or cost or market, whichever is lower)		OTHER BUSINESS DEDUCTIONS	
2. Inventory at beginning of year	\$	12. Rent	
3. Merchandise bought for sale		13. Interest on business indebtedness	
4. Labor		14. Taxes on business and business property	
5. Material and supplies		15. Losses (explain in Schedule G)	
6. Other costs (explain in Schedule G)		16. Bad debts arising from sales or services	
7. Total of lines 2 to 6	\$	17. Depreciation, obsolescence, and depletion (explain in Schedule F)	
8. Less inventory at end of year		18. Repairs	
9. Net cost of goods sold (line 7 less line 8)	\$	19. Other expenses (explain in Schedule G)	
10. Gross profit (line 1 less line 9)	\$	20. Net operating loss deduction (attach statement)	
		21. Total of lines 11 to 20	\$
		22. Total of lines 9 and 21	\$
		23. Net profit (or loss) (line 1 less line 22)	

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exchange of capital assets (from separate Schedule D) \$890 54
2. Net gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D)

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

NAME	ADDRESS	AMOUNT
1. Partnership, syndicate, etc. TAYLOR DRUG STORE, PENACOOK, N. H.		\$216 89

COST OF GOODS SOLD (To be used where inventories are an income-determining factor) (Enter the letters "C" or "M" on lines 2 and 8 if inventories are valued at either cost, or cost or market, whichever is lower)		OTHER BUSINESS DEDUCTIONS	
2. Inventory at beginning of year	\$	11. Salaries and wages not in line 4	\$
3. Merchandise bought for sale		12. Rent	
4. Labor		13. Interest on business indebtedness	
5. Material and supplies		14. Taxes on business and business property	
6. Other costs (explain in Schedule G)		15. Losses (explain in Schedule G)	
7. Total of lines 2 to 6	\$	16. Bad debts arising from sales or services	
8. Less inventory at end of year		17. Depreciation, obsolescence, and depletion (explain in Schedule F)	
9. Net cost of goods sold (line 7 less line 8)	\$	18. Repairs	
10. Gross profit (line 1 less line 9)	\$	19. Other expenses (explain in Schedule G)	
		20. Net operating loss deduction (attach statement)	
		21. Total of lines 11 to 20	\$
		22. Total of lines 9 and 21	\$
		23. Net profit (or loss) (line 1 less line 22)	

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exchange of capital assets (from separate Schedule D) \$890 54
2. Net gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D)

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

NAME	ADDRESS	AMOUNT
1. Partnership, syndicate, etc. TAYLOR DRUG STORE, PENACOOK, N. H.		\$216 89
2. Estate or trust		
3. Other sources (state nature) COMMISSION FROM UNION ASSOCIATES, WORCESTER, MASS		1200 00
Enter total here →		1416 89

Total income (or loss) from above sources (Enter as item 5, page 1)

\$1387 60

Schedule F.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES B AND C

1. Kind of property (If buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis (do not include land or other nondepreciable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in accumulating depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
BRICK BUILDING	1946	\$35600		\$1869	\$33731	33 1/2 yrs	30 1/2 yrs	\$623 00

Schedule G.—EXPLANATION OF COLUMNS 4 AND 5 OF SCHEDULE B, AND LINES 6, 15, AND 19 OF SCHEDULE C

1. Column or Line No.	2. Explanation	3. Amount	1. Column or Line No.	2. Explanation	3. Amount
B-4	LABOR & MATERIALS	\$269 93	B-5	WATER	\$21 96
B-5	Electricity	209 85		DEPOSIT BOX	24 00
	Interest	1506 17		TAXES	647 80
	ELEVATOR REPAIRS	140 55		COAL	660 57
	INSURANCE	570 00			

Form 872

U. S. Treasury Department
Internal Revenue Service
(Revised Mar. 1950)

Duplicate

CONSENT FIXING PERIOD OF LIMITATION UPON
ASSESSMENT OF INCOME AND PROFITS TAX

....., 19

In pursuance of the provisions of existing Internal Revenue Laws Daniel and Eva Smith, a taxpayer (or taxpayers) of Shrewsbury, Massachusetts, and the Commissioner of Internal Revenue hereby consent and agree as follows:

That the amount of any income, excess-profits, or war-profits taxes due under any return (or returns) made by or on behalf of the above-named taxpayer (or taxpayers) for the taxable year ended December 31, 1947, under existing acts, or under prior revenue acts, may be assessed at any time on or before June 30, 1952, except that, if a notice of a deficiency in tax is sent to said taxpayer (or taxpayers) by registered mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the

U. S. INDIVIDUAL INCOME TAX RETURN

1948

For calendar year 1948 or fiscal year beginning _____, 1948, and ending _____, 1949

EMPLOYEES: Instead of this form, you may use Form 1040A if your total income was less than \$5,000, consisting wholly of wages shown on Forms W-2, or of such wages and not more than \$100 of other wages, dividends, and interest.

Name Daniel and Eva Smith
(PLEASE PRINT. If this is a joint return of husband and wife, use first names of both)

HOME ADDRESS 16 ST. JAMES ROAD
(PLEASE PRINT. Street and number or rural route)

Shrewsbury MASS.
(City, town, or post office) (Postal zone number) (State)

Occupation _____ Social Security No. _____

Do not write in these spaces

File Code _____
Serial No. 9091577
(Cashier's Stamp)

Handwritten:
Gut 3
052-154
6-2-53
JMS

1. List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband). List names of other close relatives (as defined in Instructions) with 1948 incomes of less than \$500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

Your exemptions

Name (please print)	Check below whether you (or your wife) were at the end of your taxable year—		On lines a and b below— Write 1 if neither 65 nor blind; Write 2 if either 65 or blind; Write 3 if both 65 and blind.
	65 OR OVER	BLIND	
Your name <u>Daniel Smith</u>	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	a. Number of exemptions for you <u>1</u>
Wife's (or husband's) name <u>Eva Smith</u>	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	b. Number of her (his) exemptions <u>1</u>
Name of Other Dependent Relative <u>Janet Ruth Smith</u>		Relationship <u>Daughter</u>	Address: If different from yours _____
RECEIVED 4 MAR 8 1949 COLL. INT. DIV.			

Enter here total number of exemptions claimed (yours and your wife's plus one for each dependent listed above) → 3

Your income

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1948, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Also enter amount of income tax withheld. Members of armed forces and persons claiming traveling or reimbursed expenses, see Instructions.

Print Employer's Name	Where Employed (City and State)	Amount of Income Tax Withheld	Total Wages
		\$	\$
		\$	\$
		\$	\$
Enter totals		\$	\$
3. Enter here the total amount of your dividends			<u>479</u> <u>50</u>
4. Enter here the total amount of your interest (including interest from Government obligations unless wholly exempt from taxation)			<u>76</u> <u>26</u>

Your income

Enter here total number of exemptions claimed (yours and your wife's plus one for each dependent listed above) → 3

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1948, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Also enter amount of income tax withheld. Members of armed forces and persons claiming traveling or reimbursed expenses, see Instructions.

Print Employer's Name	Where Employed (City and State)	Amount of Income Tax Withheld	Total Wages
		\$	\$
		\$	\$
		\$	\$
Enter totals		\$	\$
3. Enter here the total amount of your dividends			<u>479</u> <u>50</u>
4. Enter here the total amount of your interest (including interest from Government obligations unless wholly exempt from taxation)			<u>76</u> <u>26</u>
5. If you received any other income, give details on page 2 and enter the total here			<u>4293</u> <u>75</u>
6. Add income shown in items 2, 3, 4, and 5, and enter the total here			<u>\$4849</u> <u>51</u>

How to figure your tax

IF YOUR INCOME WAS LESS THAN \$5,000.—You may find your tax in the tax table on page 4. This table, which is provided by law, automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 3.

IF YOUR INCOME WAS \$5,000 OR MORE.—Disregard the tax table and compute your tax on page 3. You may either take a standard deduction or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—To obtain benefits of split-income provisions, husband and wife must file a joint return. If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

Tax due or refund

7. Enter your tax from table on page 4, or from line 18, page 3. \$422

8. How much have you paid on your 1948 income tax?
(A) Total tax in item 2, above (attach Original Forms W-2) \$528
(B) By payments on 1948 Declaration of Estimated Tax 0

9. If your tax (item 7) is larger than payments (item 8), enter BALANCE OF TAX DUE here. \$106

10. If your payments (item 8) are larger than your tax (item 7), enter the OVERPAYMENT here. 0

Check (✓) whether you want this overpayment: Refunded to you ☐; or Credited on your 1949 estimated tax ☒

If you filed a return for a prior year, what was the latest year? 1947

To which collector's office was it sent? Boston, MASS.

To which collector's office did you pay amount claimed in item 8 (B), above? Boston, MASS.

Is your wife (or husband) making a separate return for 1948? No
(Yes or No)

If "Yes," write her (or his) name _____

Collector's office to which sent _____

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of person, other than taxpayer, preparing this return) _____ (Date) _____

(Name of firm or employer, if any) _____

(Signature of taxpayer) Daniel Smith 2-26-49
(Date)

(Signature of taxpayer's wife or husband if this is a joint return) Eva Smith 2-26-49
(Date)

To assure any benefits of split-income provisions, husband and wife must include all their income, and BOTH MUST SIGN, even though only one has income.

Schedule A.—INCOME FROM ANNUITIES OR PENSIONS

1. Cost of annuity (total amount you paid in) \$	4. Total amount received this year \$
2. Amount received tax-free in prior years	5. Excess, if any, of line 4 over line 3
3. Remainder of cost (line 1 less line 2) \$	6. Enter line 5, or 3 percent of line 1, whichever is greater (but do not enter more than line 4)

Schedule B.—INCOME FROM RENTS AND ROYALTIES

1. Kind and location of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule F)	4. Repairs (explain in Schedule G)	5. Other expenses (itemize in Schedule G)
BRICK BUILDING	\$ 4380	\$ 623	\$ 230	\$ 3440
Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5)				

Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Farmers should obtain Form 1040F)

State (1) nature of business News Service; (2) business name UNION ASSOC.; (3) business address 9 BARTLETT STREET, WORCESTER, MASS.
Do NOT include in this schedule cost of goods withdrawn for personal use or deductions not connected with business or profession.

1. Total receipts	\$ 29640	W
COST OF GOODS SOLD (To be used where inventories are an income-determining factor) (Enter the letters "C" or "M" on lines 2 and 8 if inventories are valued at either cost, or cost or market, whichever is lower)		
2. Inventory at beginning of year	\$	
3. Merchandise bought for sale		
4. Labor		
5. Material and supplies		
6. Other costs (explain in Schedule G)		
7. Total of lines 2 to 6	\$	
8. Less inventory at end of year		
9. Net cost of goods sold (line 7 less line 8)	\$	
10. Gross profit (line 1 less line 9)	\$	
OTHER BUSINESS DEDUCTIONS		
11. Salaries and wages not in line 4	\$ 5980	W
12. Interest on business indebtedness		
13. Taxes on business and business property		
14. Losses (explain in Schedule G)		
15. Bad debts arising from sales or services		
16. Depreciation, obsolescence, and depletion (explain in Schedule F)		
17. Rent, repairs, and other expenses (explain in Schedule G)	19580	12
18. Amortization of emergency facilities (attach statement)		
19. Net operating loss deduction (attach statement)		
20. Total of lines 11 to 19	\$ 25560	12
21. Total of lines 9 and 20	\$ 25560	12
22. Net profit (or loss) (line 1 less line 21)		

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exchange of capital assets (from separate Schedule D)	
2. Net gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D)	

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

1. Name and address of partnership, syndicate, etc. <u>Taylor Drug Store</u>	Amount, \$ 127	33
2. Name and address of estate or trust <u>PCNACOOK, N.H.</u>	Amount,	

10. no profit (line 1 less line 9) 11. no profit (line 1 less line 9) 12. no profit (line 1 less line 9) 13. no profit (line 1 less line 9) 14. no profit (line 1 less line 9) 15. no profit (line 1 less line 9) 16. no profit (line 1 less line 9) 17. no profit (line 1 less line 9) 18. no profit (line 1 less line 9) 19. no profit (line 1 less line 9) 20. no profit (line 1 less line 9) 21. no profit (line 1 less line 9) 22. no profit (line 1 less line 9) 23. no profit (line 1 less line 9) 24. no profit (line 1 less line 9) 25. no profit (line 1 less line 9) 26. no profit (line 1 less line 9) 27. no profit (line 1 less line 9) 28. no profit (line 1 less line 9) 29. no profit (line 1 less line 9) 30. no profit (line 1 less line 9) 31. no profit (line 1 less line 9) 32. no profit (line 1 less line 9) 33. no profit (line 1 less line 9) 34. no profit (line 1 less line 9) 35. no profit (line 1 less line 9) 36. no profit (line 1 less line 9) 37. no profit (line 1 less line 9) 38. no profit (line 1 less line 9) 39. no profit (line 1 less line 9) 40. no profit (line 1 less line 9) 41. no profit (line 1 less line 9) 42. no profit (line 1 less line 9) 43. no profit (line 1 less line 9) 44. no profit (line 1 less line 9) 45. no profit (line 1 less line 9) 46. no profit (line 1 less line 9) 47. no profit (line 1 less line 9) 48. no profit (line 1 less line 9) 49. no profit (line 1 less line 9) 50. no profit (line 1 less line 9) 51. no profit (line 1 less line 9) 52. no profit (line 1 less line 9) 53. no profit (line 1 less line 9) 54. no profit (line 1 less line 9) 55. no profit (line 1 less line 9) 56. no profit (line 1 less line 9) 57. no profit (line 1 less line 9) 58. no profit (line 1 less line 9) 59. no profit (line 1 less line 9) 60. no profit (line 1 less line 9) 61. no profit (line 1 less line 9) 62. no profit (line 1 less line 9) 63. no profit (line 1 less line 9) 64. no profit (line 1 less line 9) 65. no profit (line 1 less line 9) 66. no profit (line 1 less line 9) 67. no profit (line 1 less line 9) 68. no profit (line 1 less line 9) 69. no profit (line 1 less line 9) 70. no profit (line 1 less line 9) 71. no profit (line 1 less line 9) 72. no profit (line 1 less line 9) 73. no profit (line 1 less line 9) 74. no profit (line 1 less line 9) 75. no profit (line 1 less line 9) 76. no profit (line 1 less line 9) 77. no profit (line 1 less line 9) 78. no profit (line 1 less line 9) 79. no profit (line 1 less line 9) 80. no profit (line 1 less line 9) 81. no profit (line 1 less line 9) 82. no profit (line 1 less line 9) 83. no profit (line 1 less line 9) 84. no profit (line 1 less line 9) 85. no profit (line 1 less line 9) 86. no profit (line 1 less line 9) 87. no profit (line 1 less line 9) 88. no profit (line 1 less line 9) 89. no profit (line 1 less line 9) 90. no profit (line 1 less line 9) 91. no profit (line 1 less line 9) 92. no profit (line 1 less line 9) 93. no profit (line 1 less line 9) 94. no profit (line 1 less line 9) 95. no profit (line 1 less line 9) 96. no profit (line 1 less line 9) 97. no profit (line 1 less line 9) 98. no profit (line 1 less line 9) 99. no profit (line 1 less line 9) 100. no profit (line 1 less line 9)

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exchange of capital assets (from separate Schedule D)	
2. Net gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D)	

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

1. Name and address of partnership, syndicate, etc. <u>Taylor Drug Store</u>	Amount, \$ 127	33
2. Name and address of estate or trust <u>PCNACOOK, N.H.</u>	Amount,	
3. Other sources (state nature)	Amount,	
4. Total	127	33

Total income from above sources (Enter as item 5, page 1)

\$ 4293 75

Schedule F.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES B AND C

1. Kind of property (if buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis (do not include land or other nondepreciable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in accounting depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
BRICK BUILDING	5-29-46	\$35600	W	\$1246	\$34354	33 1/4 yr	31 1/4 yr	\$623

Schedule G.—EXPLANATION OF COLUMNS 4 AND 5 OF SCHEDULE B, AND LINES 6, 14, AND 17 OF SCHEDULE C

1. Column or Line No.	2. Explanation	3. Amount	1. Column or Line No.	2. Explanation	3. Amount
12	RENT	\$ 296	17	SUPPLIES	\$ 215.8
17	ELECTRICITY	226	17	NEWS SERVICE	14040
17	SOCIAL SECURITY	59	17	TELEPHONE	1860
17	MASS. UNEMPLOY. TAX	161	17	JANITOR	480
17	REPAIRS	198			

10-52063-2

Schedule G

B-4	Building Repairs	189.43
B-4	Elevator	40.62
B-5	Electricity	90.16
B-5	Water	37.07
B-5	Interest	1556.22
B-5	Taxes	741.87
B-5	S&P Deposit Box	24.00
B-5	Advertising	18.40
B-5	Insurance	202.23
B-5	Coal	770.46

U. S. INDIVIDUAL INCOME TAX RETURN

1949

For calendar year 1949 or fiscal year beginning 1949, and ending 1950

EMPLOYEES: Instead of this form, you may use Form 1040A if your total income was less than \$5,000, consisting wholly of wages shown on Forms W-2, or of such wages and not more than \$100 of other wages, dividends, and interest.

Name DANIEL AND EVA SMITH
(PLEASE PRINT. If this is a joint return of husband and wife, use first names of both)

HOME ADDRESS 16 ST. JAMES ROAD
(PLEASE PRINT. Street and number or rural route)

Shrewsbury (City, town, or post office) MASS (State)

Social Security No. _____ Occupation _____

Do not write in these spaces

File Code _____
Serial No. 16567
(Cashier's Stamp)
1950
COLL. INT.
(46) DIST. N

1. List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband). List names of other close relatives (as defined in Instructions) with 1949 incomes of less than \$500 who received more than one-half of their support from you in 1949. If this is a joint return of husband and wife, list dependent relatives of both.

Name (please print)	Check below whether you (or your wife) were at the end of your taxable year—		On lines a and b below— Write 1 if neither 65 nor blind; Write 2 if either 65 or blind; Write 3 if both 65 and blind.
	65 OR OVER	BLIND	
Your name <u>Daniel Smith</u>	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	a. Number of exemptions for you <u>1</u>
Wife's (or husband's) name <u>Eva Smith</u>	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	b. Number of her (his) exemptions <u>1</u>
Name of Other Dependent Relative <u>Janet Ruth Smith</u>	Relationship <u>Daughter</u>		Address—If different from yours _____

Enter here total number of exemptions claimed (yours and your wife's plus one for each dependent listed above) 3

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1949, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Also enter amount of income tax withheld. Persons claiming traveling or reimbursed expenses, see Instructions.

Print Employer's Name	Where Employed (City and State)	Amount of Income Tax Withheld	Total Wages
		\$	\$
		\$	\$
		\$	\$
Enter totals		\$	\$

3. Enter here the total amount of your dividends 1494
4. Enter here the total amount of your interest (including interest credited on savings accounts; also interest from Government obligations unless wholly exempt from taxation) 437
5. If you received any other income, give details on page 2 and enter the total here 1387
6. Add income shown in items 2, 3, 4, and 5, and enter the total here 3319

How **IF YOUR INCOME WAS LESS THAN \$5,000.**—You may find your tax in the table on page 4. This table allows about 10 percent of your total income for charitable contributions, interest, taxes, medical expenses, etc. If such deductions exceed 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 3. **IF INCOME WAS \$5,000 OR MORE.**—Do not use tax table. Compute tax on page 3. Use standard deduction or itemize deductions, whichever is to your advantage.

Name of Other Dependent Relative	Relationship	Address—If different from yours
<u>Janet Ruth Smith</u>	<u>Daughter</u>	

Enter here total number of exemptions claimed (yours and your wife's plus one for each dependent listed above) 3

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1949, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Also enter amount of income tax withheld. Persons claiming traveling or reimbursed expenses, see Instructions.

Print Employer's Name	Where Employed (City and State)	Amount of Income Tax Withheld	Total Wages
		\$	\$
		\$	\$
		\$	\$
Enter totals		\$	\$

3. Enter here the total amount of your dividends 1494
4. Enter here the total amount of your interest (including interest credited on savings accounts; also interest from Government obligations unless wholly exempt from taxation) 437
5. If you received any other income, give details on page 2 and enter the total here 1387
6. Add income shown in items 2, 3, 4, and 5, and enter the total here 3319

How to figure the tax **IF YOUR INCOME WAS LESS THAN \$5,000.**—You may find your tax in the table on page 4. This table allows about 10 percent of your total income for charitable contributions, interest, taxes, medical expenses, etc. If such deductions exceed 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 3. **IF INCOME WAS \$5,000 OR MORE.**—Do not use tax table. Compute tax on page 3. Use standard deduction or itemize deductions, whichever is to your advantage.

7. Enter your tax from table on page 4, or from line 18, page 3 \$ 198.00
8. How much have you paid on your 1949 income tax?
(A) By tax withheld (in item 2, above). Attach Original Forms W-2 \$ 303.00
(B) By payments on 1949 Declaration of Estimated Tax 303.00
Enter total here \$ 303.00
9. If your tax (item 7) is larger than payments (item 8), enter BALANCE OF TAX DUE here \$ 105.00
10. If your payments (item 8) are larger than your tax (item 7), enter the OVERPAYMENT here \$ 105.00
Check (✓) whether you want this overpayment: Refunded to you ☐; or Credited on your 1950 estimated tax ☒
Do you owe any prior year Federal tax for which you have been billed? NO (Yes or No)

If you filed a return for a prior year, state latest year 1948
Where filed Boston, Mass.
To which Collector's office did you pay amount claimed in item 8 (B), above? Boston, Mass.
County in which you reside Worcester
Is your wife (or husband) making a separate return for 1949? NO (Yes or No)
If "Yes," write her (or his) name _____

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of person, other than taxpayer, preparing this return) _____ (Date) _____
(Signature of taxpayer) Daniel E. Smith (Date) 3-1-50
(Signature of taxpayer's wife or husband if this is a joint return) Eva G. Smith (Date) _____

To assure any benefits of split-income provisions, husband and wife must include all their income, and BOTH MUST SIGN, even though only one has income.

EXHIBIT 1
DANIEL AND EVA SMITH
Net Worth for the Years 1946 — 1950

	<i>Assets</i>					
	1945	1946	1947	1948	1949	
Checking Account	\$	\$ 100.00	\$ 400.00	\$ 750.00	\$ 550.00	Per Bank
Worcester Co-Operative	1,079.60	12,993.08	22,993.08	22,993.08	10,046.16	Per Bank
Residence, 36 Williams St., Worcester, Mass.	12,000.00	.....	.....	.....	.....
Brick Building, 9 Bartlett St., Worcester, Mass.	.....	35,600.00	35,600.00	35,600.00	35,600.00	Per Tax Return
Residence, 16 St. James Rd., Shrewsbury, Mass.	.....	9,600.00	9,600.00	9,600.00	9,600.00	Per Mr. Smith
Summer Residence, Falmouth, Mass.	.....	.....	.....	15,000.00	15,000.00	Per Mr. Smith
Building, Falmouth Bowling Club, Inc.	.....	.....	.....	.....	75,000.00	Per Mr. Smith
Stocks	.....	.....	5,792.96	19,856.20	11,355.02	Schedule 1
Automobile	2,000.00	2,900.00	3,000.00	3,000.00	3,000.00	
Total Assets	15,079.60	60,293.08	77,386.04	106,799.28	160,151.18	
		<i>Liabilities</i>				
Mortgage, 9 Bartlett St., Worcester	.....	34,000.00	33,000.00	32,000.00	31,000.00	
Mortgage, Falmouth Bowling Club Building	.....	.....	.....	.....	40,000.00	
Total Liabilities	.....	34,000.00	33,000.00	32,000.00	71,000.00	
Net Worth	15,079.60	26,293.08	44,386.04	74,799.28	89,151.18	
Increase or Decrease	\$	\$11,213.48	\$18,092.96	\$30,413.24	\$14,351.90	

This statement of Net Worth and supporting schedules attached hereto, correctly and accurately represent to the best of my ability and recollection my true worth for the period covered herein.

(s) DANIEL SMITH

Sworn to and subscribed before me this 12th day of June 1951.

(s) JOHN J. GEORGE,
Notary Public.

EXHIBIT No. 2.

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DANIEL AND EVA SMITH.
Conversion of Tax Returns to Cash Basis

	1945	1946	1947	1948	1949
Income per Tax Return Filed	\$3,068.81	\$3,777.66	\$4,690.27	\$4,849.51	\$3,319.85
Long Term Capital Gain (50%)	—	—	—	—	890.54
Depreciation Included in Tax/R	—	—	623.00	623.00	623.00
	<u>3,068.81</u>	<u>3,777.66</u>	<u>5,313.27</u>	<u>5,472.51</u>	<u>4,833.39</u>
Expenses:					
Expenses per Tax/Return	306.00	377.00	469.00	484.00	331.00
Federal Taxes	307.00	361.00	528.00	422.00	198.00
	<u>613.00</u>	<u>738.00</u>	<u>997.00</u>	<u>906.00</u>	<u>529.00</u>
	<u>\$2,455.81</u>	<u>\$3,039.66</u>	<u>\$4,316.27</u>	<u>\$4,566.51</u>	<u>\$4,304.39</u>

Record on Appeal.

EXHIBIT No. 3.

DANIEL AND EVA SMITH.

Schedule of Comparison Between Net Profit per Tax Returns and Net Increases in Net Worth

	1946	1947	1948	1949	Total
Increases in Net Worth	\$11,213.48	\$18,092.96	\$30,413.24	\$14,351.90	\$74,071.58
Add — Living Expenses	3,000.00	3,000.00	4,000.00	4,000.00	14,000.00
	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>
Increase in Net Worth					
Adjusted for Living Expenses	<u>\$14,213.48</u>	<u>\$21,092.96</u>	<u>\$34,413.24</u>	<u>\$18,351.90</u>	<u>\$88,071.58</u>

SCHEDULE 1.

DANIEL AND EVA SMITH.

List of Securities

Shs.		1947	1948	1949
100	Cin. Gas & Electric	\$2,409.71	\$2,409.71	\$ —
50	Aetna Fire Insurance	2,170.75	2,170.75	—
25	Fitchburg Gas	1,212.50	1,212.50	—
		<u>\$5,792.96</u>		
10	Cin. Gas		220.00	—
100	Celanese Corporation		2,296.65	—
50	Central National Bank		1,140.63	—
50	Cont. Bk. & Trust		1,015.00	—
150	Puget Sound Power & Light		1,216.00	—
25	Fitchburg Gas & Electric		1,137.50	—
50	Dayton Power & Light		1,271.41	1,271.41
50	Arizona Edison		712.00	712.00
45	Arizona Edison		634.31	634.31
150	Pfeiffer Brewing		1,530.33	1,530.33
100	Gen. Public Utilities		1,216.27	1,216.27
50	Com. Public Service		1,384.96	1,384.96
5	Arizona Edison		68.18	68.18
20	Arizona Edison		220.00	220.00
			<u>\$19,856.20</u>	
100	Corn Exchange			4,092.56
15	Arizona Edison			225.00
				<u>\$11,355.02</u>

DEFENDANT EXHIBIT A

Cr. 52-154

U. S. TREASURY DEPARTMENT

6/3/53

Internal Revenue Service

P. O. Box 202

Boston 1, Massachusetts

Intelligence Unit June 14, 1951

Boston Division

JPMcM:cok

Mr. William J. Delaney

c/o McDermott-Morris Delaney & Co.

141 Milk Street

Boston, Mass.

In re: Daniel L. and Eva Smith

Shrewsbury, Mass.

Dear Sir:

There is enclosed herewith a treasurer's check, A32989, made payable to the Collector of Internal Revenue, issued by the Guaranty Bank and Trust Company of Worcester, Mass., dated June 12, 1951 in the amount of \$15,000.00. The above-mentioned check was left with me on Wednesday, June 13, 1951, as part payment of any taxes which may be due by the above-named taxpayer.

After a conference with David A. Kelleher, Special Agent in Charge, and Domenic A. Ierardi, head of the Racket Squad, it was determined by this office not to accept this payment. As you already know, where possible prosecution may be recommended, no payment of taxes is accepted until that feature of the investigation is decided.

If you desire any further conference in respect to this matter, such discussion can be had with Mr. Ierardi, who heads the Racket Squad.

Very truly yours,

(s) JOHN P. McMAHON,

Special Agent.

DEFENDANT'S EXHIBIT L.

LEASE.

THIS INDENTURE by and between Eva George Smith of Shrewsbury, Worcester County, Massachusetts, hereinafter called the Lessor and Falmouth Bowling Club, Inc. a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, and having its principal office and place of business in Falmouth, Barnstable County, Massachusetts, hereinafter called the Lessee

WITNESSETH: That in consideration of the rents and covenants herein reserved and contained on the part of the Lessee to be paid, performed and observed, the Lessor does hereby demise and lease unto the Lessee

The land and buildings situated on the Northerly side of East Main Street, Falmouth, Massachusetts heretofore occupied and used by the Lessee, and being the premises which are set forth in a deed from Lester T. Crane et ux to Eva George Smith, dated December 15, 1949 and recorded with Barnstable County Registry of Deeds in Book 737, Page 137, to which deed reference is made for a more particular description.

Together with the furniture, furnishings, fixtures, equipment, machinery, appliances, and all personal property now located upon said premises and used in the operation of Falmouth Bowling Club, Inc. and hereafter placed upon the premises by the Lessor.

The parties agree that the Lessee will pay all expenses and charges for real estate and personal property taxes, insurance, water, fuel, light and power, and all other charges for utilities and maintenance of the demised premises and property.

The parties further agree that the Lessee shall take care of at its own expense, and be responsible for, all repairs to the interior and exterior of the real estate, and shall

keep and maintain the buildings, grounds and personal property in good repair, and in clean condition, throughout the terms of this lease.

The Lessee agrees to indemnify the Lessor against and save the Lessor harmless from all loss, claims for or damage occasioned by the Lessee's use and occupation of the demised premises and property.

To have and to hold the premises and property hereby leased unto the Lessee, its successors and assigns for the term of five (5) years from January 1, 1950.

The Lessee agrees to pay to the Lessor as rent an amount equal to Ten (10%) per cent of the gross amount received by the Lessee in each and every year during the term of this lease. For the purpose of this lease the term "gross amount received" shall include all sums taken in by the Lessee through sale of food, beverages, merchandise and all other moneys received and taken in except for membership fees. The said year shall be for each calendar year, and the rent aforesaid shall be payable in installments of Two Hundred (\$200.00) Dollars on the first day of each and every month, the first installment of Two Hundred (\$200.00) Dollars for the month beginning January 1, 1950 to be due and payable at the time of the signing of this lease. On the first day of February, 1951, and thereafter on the first day of February in each and every succeeding year during the term of this lease, the parties shall have an accounting, the amount of the rent for the preceding year shall be determined, and the parties shall settle their balances for said preceding year.

The Lessee agrees to keep accurate books, records and accounts, and to produce such books, records and accounts upon request of the Lessor, and that the Lessor, her attorneys, accountants and agents shall have the right to ex-

amine and inspect said books, records and accounts at all reasonable times.

It is understood and agreed that in this indenture the term "Lessor" shall include and be binding upon the Lessor, her heirs, executors, administrators and assigns; and that the term "Lessee" shall include and be binding upon the Lessee, its successors and assigns.

And the Lessee doth hereby promise to quit and deliver up the premises to the Lessor, or her attorney, peaceably and quietly, at the end of the term, in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are, or may be put into by the said Lessor, and to pay the rent as above stated, during the term, and also the rent as above stated, for such further time as the Lessee may hold the same, and not make or suffer any waste thereof; nor lease, nor underlet, nor permit any other person or persons to occupy or improve the same, or make or suffer to be made any alteration therein, but with the approval of the Lessor thereto, in writing, having first been obtained; and that the Lessor may enter to view and make improvements, and to expel the Lessee if it shall fail to pay the rent as aforesaid, or make or suffer any strip or waste thereof.

And provided also, that in case the premises, property, or any part thereof during the said term, be destroyed or damaged by fire or other unavoidable casualty, so that the same shall be thereby rendered unfit for use and habitation, then, and in such case, the rent hereinbefore reserved, or a just and proportional part thereof, according to the nature and extent of the injuries sustained, shall be suspended or abated until the said premises shall have been put in proper condition for use and habitation by said Lessor, or these presents shall thereby be determined and ended at the election of the said Lessor or her legal representatives.

In witness whereof the parties have hereto interchange-

ably set their hands and seals this
of January, 1950.

day

(s) EVA GEORGE SMITH,

Lessor.

FALMOUTH BOWLING CLUB, INC.

(s) JOHN J. GEORGE,

President,

ELSIE T. GEORGE,

Treasurer,

Lessee.

Hereto duly authorized by vote of the Board of Directors.

DEFENDANT'S EXHIBIT O.

[Marginal notation] Lalande to Smith, 1 - \$5.00 Stamp,
1 - \$1.00 Stamp, 1 - 50c Stamp, 1 - 10c Stamp, Cancelled.

I, Joseph A. Lalande, of Worcester, Worcester County, Massachusetts, being married, for consideration paid, grant to Eva F. Smith of Shrewsbury in said County with WARRANTY covenants. Two parcels of land in said WORCESTER on Bartlett Street, bounded and described as follows:

Parcel I: A certain parcel of land with the buildings thereon situated on the Easterly side of Bartlett Street in the City of Worcester, bounded and described as follows: Beginning at the Northwesterly corner thereof at a point in the Easterly line of Bartlett Street; thence running Easterly by a line established by deed from Ransom F. Taylor to Napoleon P. Huot recorded with the Worcester District Registry of Deeds, Book 1193 Page 258, about forty-eight (48) feet and ten (10) inches to a point at land formerly of Joseph A. Tenney; thence Southerly by said Tenney about seventy (70) feet and eight (8) inches to a point; thence Westerly by a line established by deed of Eliza P. Reegan, dated December 28, 1884, and recorded with the Worcester District Registry of Deeds, Book 1193, Page 259, about forty-eight (48) feet and ten (10) inches

to a point in said Easterly line of said Bartlett Street; thence Northerly by said Bartlett Street about seventy (70) feet and eight (8) inches to the place of beginning.

[Marginal notation] See Plan Book 139, Plan 54

Meaning and intending to convey the same premises conveyed to Napoleon P. Huot by Katherine Kerber by her deed dated September 22, 1884 and recorded with Worcester District Registry of Deeds, Book 1178, Page 509.

Grantor's title was acquired by a tax deed dated August 7, 1834 and recorded in Worcester District Registry of Deeds, Book 2619, Page 89.

Subject to and with all privileges of party wall agreement.

Parcel II: A certain parcel of land with the buildings thereon situated on the Westerly side of Bartlett Street, bounded and described as follows: Beginning at the junction of the Westerly line of Bartlett Street with the Southerly line of Harding Alley; thence S. $15^{\circ} 25'$ W. thirty-eight (38) feet by the Westerly line of Bartlett Street to land now or formerly of one Lalande; thence N. $74^{\circ} 35'$ W. sixty and forty hundredths (60.40) feet by said Lalande land to a corner; thence N. $14^{\circ} 09' 30''$ E. thirty-eight and eighty-one hundredths (38.81) feet by land now or formerly of one Rome to the Southerly line of Harding Alley; thence S. $73^{\circ} 50'$ E. sixty-one and twenty-five hundredths (61.25) feet by the Southerly line of Harding Alley to the place of beginning. Containing 2,335 square feet, more or less, as shown on plan of land owned by Joseph A. Lalande by Francis B. Thompson, C. E. dated May 22, 1946, to be recorded herewith.

Also any rights that I may have to pass and repass in common with others over a strip of land lying next Northerly to the tract above described and called Harding Alley, a more accurate description of which is in the Worcester District Registry of Deeds, Book 734, Page 359.

Being part of the same premises conveyed to me by deed of Bertha L. Latimer, Trustee, dated January 31, 1941 and recorded with said Deeds, Book 2806, Page 312.

The lease to M. H. Terkanian referred to in previous instruments is not now in force and effect and the grantor herein agrees to hold the grantee harmless therefrom.

Subject to taxes for the year 1946.

I, Alma M. Lalande, wife of said grantor, release to said grantee all rights of DOWER and HOMESTEAD and other interests therein.

WITNESS our hands and seals this twenty-ninth day of May 1946.

JOSEPH A. LALANDE,

ALMA M. LALANDE.

The Commonwealth of Massachusetts
Worcester, ss. May 29, 1946 Then personally appeared
the above named Joseph A. Lalande and acknowledged the
foregoing instrument to be his free act and deed, before me

GEORGE E. RICE *Notary Public*

My commission expires July 10, 1951

Rec'd May 29, 1946 at 4h. 41m. P.M. Ent'd & Ex'd

. . .

[Marginal notation] Smith to Lalande et ux.

I, Eva F. Smith, of Shrewsbury, Worcester County, Massachusetts being married, for consideration paid, grant to Joseph A. Lalande and Alma M. Lalande, husband and wife, jointly, of Worcester, in said County, with MORTGAGE covenants, to secure the payment of Thirty-three Thousand (\$33,000.00) and 00/100 Dollars payable \$250.00 on principal quarterly with five (5%) per cent interest, per annum, payable quarterly as provided in my note of even date, two parcels of land in said WORCESTER on Bartlett Street, bounded and described as follows:

Parcel I: A certain parcel of land with the buildings

thereon situated on the Easterly side of Bartlett Street in the City of Worcester, bounded and described as follows: Beginning at the Northwesterly corner thereof at a point in the Easterly line of Bartlett Street; thence running Easterly by a line established by deed from Ransom F. Taylor to Napoleon P. Huot recorded with Worcester District Registry of Deeds, Book 1193, Page 258, about forty-eight (48) feet and ten (10) inches to a point at land formerly of Joseph A. Tenney; thence Southerly by said Tenney about seventy (70) feet and eight (8) inches to a point; thence Westerly by a line established by deed of Eliza P. Reegan, dated December 28, 1884, and recorded with the Worcester District Registry of Deeds, Book 1193, Page 259, about forty-eight (48) feet and ten (10) inches to a point in said Easterly line of said Bartlett Street; thence Northerly by said Bartlett Street about seventy (70) feet and eight (8) inches to the place of beginning.

Being the same premises conveyed to me by deed of Joseph A. Lalande of even date to be herewith recorded.

Subject to and with all privileges of party wall agreement.

Parcel II: A certain parcel of land with the buildings thereon situated on the Westerly side of Bartlett Street, bounded and described as follows: Beginning at the junction of the Westerly line of Bartlett Street with the Southerly line of Harding Alley; thence S. $15^{\circ} 25'$ W. thirty-eight (38) feet by the Westerly line of Bartlett Street to land now or formerly of one Lalande; thence N. $74^{\circ} 35'$ W. sixty and forty hundredths (60.40) feet by the said Lalande land to a corner; thence N. $14^{\circ} 09' 30''$ E. thirty-eight and eighty-one hundredths (38.81) feet by land now or formerly of one Rome to the Southerly line of Harding Alley; thence S. $73^{\circ} 50'$ E. sixty-one and twenty-five hundredths (61.25) feet by the Southerly line of Harding Alley to the place of beginning. Containing 2,335 square feet, more or less, as

shown on plan of land owned by Joseph A. Lalande by Francis B. Thompson, C. E. dated May 22, 1946, to be recorded herewith.

Also any rights that I may have to pass and repass in common with others over a strip of land lying next Northerly to the tract above described and called Harding Alley, a more accurate description of which is in the Worcester District Registry of Deeds, Book 734, Page 359.

Being the same premises conveyed to me by deed of Joseph A. Lalande of even date to be herewith recorded.

This mortgage is upon the statutory condition, for any breach of which the mortgagee shall have the statutory power of sale.

I, Daniel L. Smith, husband of said mortgagor, release to the mortgagees all rights of tenancy by the curtesy and other interests in the mortgaged premises.

WITNESS our hands and seals this twenty ninth day of May 1946.

EVA F. SMITH,

DANIEL L. SMITH.

The Commonwealth of Massachusetts

Worcester, ss. May 29, 1946 Then personally appeared the above named Eva F. Smith and acknowledged the foregoing instrument to be her free act and deed, before me

JOHN J. GEORGE *Notary Public*

My commission expires May 22, 1947

Rec'd May 29, 1946 at 4h. 41m. P.M. Ent'd & Ex'd

• • •

Worcester, ss. A true photostatic copy of record, recorded with Worcester District Registry of Deeds, Book 2999, Page 583,-584-585.

Attest:

(s) ROBERT R. GALLAGHER,

Register.

COMMONWEALTH OF MASSACHUSETTS

I, WILLIAM C. GILES, Justice of the Superior Court, of the Commonwealth of Massachusetts, do certify that Robert R. Gallagher, Esq., whose signature is affixed to the papers hereto annexed, is Register of Worcester District Registry of Deeds for the County of Worcester, and has the keeping of the files, records and proceedings of said Registry, within and for said County, and is by law, the proper person to make out and certify copies thereof, and that full faith and credit are and ought to be given to his acts and attestations done as aforesaid, and that his attestations to the papers hereto annexed, are in due form.

In Testimony whereof, I have hereunto set my hand and caused the seal of the said Court to be hereunto affixed, this first day of June in the year of our Lord one thousand nine hundred and fifty-three.

(s) WILLIAM C. GILES,
Justice of the Superior Court.

COMMONWEALTH OF MASSACHUSETTS

Worcester, ss.

Superior Court

I, PHILIP S. SMITH, Clerk of the Superior Court of the Commonwealth of Massachusetts, within and for said County of Worcester, do hereby certify that William C. Giles, Esquire, is a Justice of said Superior Court within and for said Commonwealth of Massachusetts.

Witness my hand and the seal of said Superior Court this first day of June in the year of our Lord one thousand nine hundred and fifty-three.

(s) PHILIP S. SMITH,
Clerk.

DEFENDANT'S EXHIBIT P.

We, WILLIAM F. LUCEY and GRACE E. LUCEY, husband and wife as tenants by the entirety, of Shrewsbury, Worcester County, Massachusetts, for consideration paid, grant to

EVA GEORGE SMITH of Worcester with WARRANTY COVENANTS the land in the Town of Shrewsbury, on the westerly side of St. James Road.

The land with the buildings thereon, being a part of lots #10 and #11 on a plan of house lots owned by Katz and Leavitt in Shrewsbury, dated May, 1927, R. E. Allen & Sons, C. E., bounded and described as follows:

Beginning at a point on the westerly line of St. James Road, which point is three hundred thirty (330) feet from the southerly line of Maple Avenue;

Thence running westerly by the southerly line of Lot 9 one hundred ninety-three and seven tenths (193.7) feet to a point on the easterly line of Lot 5 on said plan;

Thence running southerly by the easterly line of Lot 5 on said plan forty-seven and five tenths (47.5) feet to a point on the southeasterly corner of Lot 5 on said plan;

Thence running easterly by land now or formerly of Ralph G. Paulsen and wife, about sixty-four (64) feet to a point at land now or formerly of P. H. Moran;

Thence northeasterly by said Moran land about fifteen (15) feet to a point at the northwesterly corner of Lot 11 on said plan;

Thence turning at about right angles and running southerly by said Moran land two (2) feet more or less to a point in Lot 11 on said plan;

Thence running easterly one hundred forty-five (145) feet, more or less, in a line distant two (2) feet southerly from the northerly line of said Lot 11 to a point on the westerly line of said St. James Road;

Thence northwesterly by the westerly line of St. James Road seventy-nine and six tenths (79.6) feet to the place of beginning.

Being the same premises conveyed to us by deed of John J. Shea et al, dated May 22, 1939, and recorded with

Worcester District Registry of Deeds, Book 2746, Page 281.

The above premises are conveyed subject to a mortgage to the Worcester Co-operative Federal Savings & Loan Association, on which there is now due \$6,253.28, and taxes assessed for the year 1943, which the grantee hereby assumes and agrees to pay. Subject also to restrictions of record, if any.

[Documentary stamps in amount of \$3.85 affixed and cancelled]

WITNESS our hands and seals this 8th day of July 1943.

(s) WILLIAM F. LUCEY,

(s) GRACE E. LUCEY.

THE COMMONWEALTH OF MASSACHUSETTS

Worcester, ss. July 9th 1943

Then personally appeared the above named WILLIAM F. LUCEY and acknowledged the foregoing instrument to be his free act and deed, before me

JAMES A. NOTEY,

Notary Public.

My commission expires Feb. 18, 1946

Rec'd July 9, 1943 at 11h. 34m. A.M. Ent'd & Ex'd.

Worcester ss. A true photostatic copy of record, recorded with Worcester District Registry of Deeds, Book 2889, Page 394.

Attest:

ROBERT R. GALLAGHER,

Register.

COMMONWEALTH OF MASSACHUSETTS

I, WILLIAM C. GILES, Justice of the Superior Court, of the Commonwealth of Massachusetts, do certify that Robert R. Gallagher, Esq., whose signature is affixed to the papers hereto annexed, is Register of Worcester District Registry

of Deeds for the County of Worcester, and has the keeping of the files, records and proceedings of said Registry, within and for said County, and is by law, the proper person to make out and certify copies thereof, and that full faith and credit are and ought to be given to his acts and attestations done as aforesaid, and that his attestations to the papers hereto annexed, are in due form.

In Testimony whereof, I have hereunto set my hand and caused the seal of the said Court to be hereunto affixed, this first day of June in the year of our Lord one thousand nine hundred and fifty-three.

WILLIAM C. GILES,
Justice of the Superior Court.

COMMONWEALTH OF MASSACHUSETTS

Worcester, ss.

Superior Court

I, PHILIP S. SMITH, Clerk of the Superior Court of the Commonwealth of Massachusetts, within and for said County of Worcester, do hereby certify that William C. Giles, Esquire, is a Justice of said Superior Court within and for said Commonwealth of Massachusetts.

Witness my hand and the seal of said Superior Court this first day of June in the year of our Lord one thousand nine hundred and fifty-three.

(s) PHILIP S. SMITH,
Clerk.

NOTICE OF APPEAL.

[Filed June 24, 1953.]

Name and address of appellant: Daniel L. Smith, 16 St. James Road, Shrewsbury, Massachusetts.

Name and address of appellant's attorney: W. Arthur Garrity, Jr., 10 State Street, Boston, Massachusetts.

Offense: Income tax evasion, violations of Section 145 (b)

of the Internal Revenue Code for the years 1946, 1947, 1948 and 1949.

Concise statement of judgment or order, giving date, and and sentence:

Judgment of guilty of income tax evasion for each of the years 1946, 1947, 1948 and 1949, being the first four counts of the indictment herein, said judgment being dated June 16, 1953; the defendant was sentenced to a term of imprisonment for a period of one year and one day on each of the said first four counts of the indictment, the prison sentences to run consecutively; and the defendant was further ordered to pay a fine of \$5,000.00.

Name of institution where now confined, if not on bail:
The defendant has been admitted to bail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the First Circuit from the above-stated judgment.

Dated: June 23, 1953.

(s) W. ARTHUR GARREITY, JR.

Appellant's Attorney.

STATEMENT OF POINTS ON APPEAL.

[Filed October 1, 1953.]

Now comes the defendant Daniel L. Smith and states that the points on which he intends to rely on the appeal from the judgment herein entered June 16, 1953, are that the Court erred in:

1. Denying the defendant's motion to suppress a so-called Net Worth Statement (marked Exhibit 20 at the trial);
2. Admitting the Net Worth Statement in evidence as Exhibit 20;
3. Permitting witness Toohey, the Revenue Agent, to compute a tax allegedly owing by the defendant on the basis

of a joint net worth statement which did not segregate the assets owned by the co-defendants;

4. Refusing to strike witness Toohey's testimony comparing the figures in Exhibit 20 with the figures on the blackboard representing the witness' computation of assets owned by either of the co-defendants;

5. Denying the defendant's motion for a judgment of acquittal as to the first four counts of the indictment;

6. Denying the defendant's motion to remove from the view of the jury two blackboards showing balances in bank accounts in which the defendant had no interest and the costs of assets in which the defendant had no interest;

7. Failing to consider and grant the defendant's requests for instructions, in particular those numbered 28, 33, 34, 37, 38, 39, 42, 44 and 45.

8. Failing when instructing the jury after the charge to correct adequately statements in the charge that every bit of evidence in the case could be used against the defendant.

9. Failing when instructing the jury after the charge to correct statements in the charge to the effect that an increase in net worth substantially in excess of reported receipts is the test of a wilful attempt to evade a tax;

10. Charging the jury as follows:

a) "And if you are satisfied that the evidence they gave you point to the receipt of monies that he failed to report and your decision excludes all other reasonable theories or hypotheses, then you would be justified in convicting.

"Now the last thing you should leave out of the courtroom is your own good common sense. You have lived some years. You have met people. You have seen situations and in short you probably all have good judgment."

b) "Now the crime charged has really three elements to it. It is the attempt, the willful attempt to evade a tax. Now I don't think there is anything very difficult about these things. It means a willful, intentional attempt to evade a tax."

c) "From all the facts you can find, if you can get to that, you have got to be able to set out that this man was worth so many dollars on a certain date. From there you go to the next year. Let's say that you start his net worth on December 31 and it's X dollars. Now on December 31 of next year what was his net worth? It's X plus something. Was that plus something different than he reported? Was it substantially more? In that way you arrive at whether or not there was a willful attempt to evade the tax."

d) "The question here is very simple and you are not to go off on tangents and get mixed up with whether this man is a bootlegger or whether he is a bookie or anything else. It's a simple question that you are asked to answer, and you are to answer whether or not in each of these years this man attempted to evade his income taxes."

11. Failing in the charge

a) To state that an element of the crime is that there be a tax owing;

b) To define the element of willfulness;

c) To distinguish between increases in net worth and income;

d) To distinguish between the receipt of monies and income;

e) To state the so-called reasonable hypothesis rule regarding circumstantial evidence.

The defendant expressly reserves all other points pre-

sented on the record included in his designation of the contents of record whether or not referred to herein.

By his Attorney,
(s) W. ARTHUR GARRITY, JR.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

[Filed October 1, 1953.]

Now comes the defendant Daniel L. Smith and hereby designates the following portions of the record proceedings and evidence to be contained in the record on appeal:

1. Indictment.
2. Arraignment and Plea.
3. Motion for a Bill of Particulars.
4. Government's Answer to Motion for a Bill of Particulars filed by Defendant Daniel L. Smith.
5. Stenographic transcript of hearing on motion for Bill of Particulars, January 5, 1953, pages 2 through 8.
6. Motion for the Return of Property and the Suppression of Evidence.
7. All trial testimony and proceedings pertaining to the years 1946, 1947, 1948 and 1949, being the entire testimony of the following witnesses at the following pages of the transcript, except where condensed statements of witnesses' testimony are filed with this designation, as follows:

June 2, 1953

1. Roche—condensed statement attached
2. Erickson—condensed statement attached
3. Jones—condensed statement attached
4. MacPhee—condensed statement attached
5. Holderness—condensed statement attached
6. Cross—condensed statement attached
7. Flynn—condensed statement attached
8. Rea—condensed statement attached

9. Storey—condensed statement attached
10. Janet Smith—condensed statement attached
11. Gallivan—condensed statement attached
12. Ward—condensed statement attached
13. George—pp. 84-105
14. Murano—pp. 105-111
15. Bates—condensed statement attached
16. Hanchett—condensed statement attached
17. McMahon—pp. 118-151

June 3 1953

17. McMahon—pp. 152-186
18. Romer—pp. 186-188
19. Hallowell—pp. 188-190
20. Maddigan—pp. 210-212
21. Crane—pp. 213-216
22. Taylor—pp. 216-221
23. Rainie—pp. 222-225
24. Gautreau—pp. 226-231
25. Bianchi—pp. 232-233

Court's statement, etc.—p. 235, l. 16 to end of p. 236.

June 4, 1953

Bench conference—pp. 237-239

26. Toohey—pp. 239-309 including hearing on objection, pp. 254-268

Court's statement, etc.—pp. 309-311

DEFENSE:

1. Delaney—pp. 311-336

Motion for acquittal renewed—p. 343

June 5, 1953

Conference in lobby—pp. 354-355

Court's statement—pp. 355-356

Charge to jury—pp. 385-391

Bench conferences—pp. 392-396

Verdict—p. 396.

8. Government's Exhibits:

1. 1946 joint income tax return
2. 1947 joint income tax return
3. 1948 joint income tax return
4. 1949 joint income tax return
20. Net worth statement so-called

9. Defendant's Exhibits:

- A. Letter dated June 14, 1951, signed by Witness McMahon
- B. Three-page memorandum by Witness McMahon
- L. Lease, from Eva George Smith to Falmouth Bowling Club, Inc.
- O. Photostatic copy of deed, Joseph A. Lalaude to Eva F. Smith
- P. Photostatic copy of deed, William F. Lucey and Grace E. Lucey to Eva George Smith, dated July 9, 1943.

10. Motion for Judgment of Acquittal.

11. Defendant's Requests for Instructions.

12. Affidavit as to Contents of Blackboards.

13. Judgment and Commitment.

14. Docket Entries.

15. Notice of Appeal.

16. Stipulation as to Exhibits.

17. Stipulation as to the Sufficiency of Evidence Included in the Record.

18. This designation.

By his attorney,
(s) W. ARTHUR GARRITY, JR.

COUNTERDESIGNATION OF CONTENTS OF RECORD ON APPEAL

[Filed October 13, 1953.]

The plaintiff, United States of America, hereby counter-designates, to be contained in the record on appeal, the following additional portions of the testimony of the following witnesses at the following pages of the transcript:

1. Erickson—p. 28, l. 22 to p. 29, l. 5;
2. MacPhee—p. 44, l. 12 to l. 24.

ANTHONY JULIAN,

United States Attorney.

(s) FRANCIS J. DiMENTO,

Assistant U. S. Attorney.

STIPULATION AS TO THE SUFFICIENCY OF EVIDENCE INCLUDED IN THE RECORD

[Filed October 14, 1953.]

It is hereby stipulated and agreed between the United States of America and Daniel L. Smith that the portions of the evidence designated by the parties for inclusion in the record and the exhibits include all the evidence material to the issues presented by the defendant's statement of points.

(s) W. LANGDON POWERS,

Assistant U. S. Attorney.

(s) W. ARTHUR GARRITY, JR.

Defendant's Attorney.

STIPULATION AS TO EXHIBITS

[Filed October 14, 1953.]

It is hereby stipulated and agreed between the United States of America and the defendant Daniel L. Smith:

(1) That all of the exhibits shall be transmitted in their physical form without the necessity for reproduction or inclusion in the printed transcript of record for the purpose of reference thereto by the Court of Appeals and counsel, with the same force and effect as if reproduced in such transcript of record, provided that exhibits designated by either party for inclusion in the printed transcript of record shall be so included and also transmitted in their physical form; and

(2) That in the case of any exhibit which was read in full into evidence, the transcript of the evidence if included in the printed transcript of record may be used to the same effect as the original exhibit.

(s) W. LANGDON POWERS,
Assistant U. S. Attorney.

(s) W. ARTHUR GARRITY, JR.
Defendant's Attorney.

The above stipulation is hereby approved.

CALVERT MAGRUDER,
Circuit Judge.

[MEMORANDUM: Orders of enlargement of time in the District Court for docketing case to and including November 13, 1953, are here omitted. JOHN A. CANAVAN, *Clerk.*]

CLERK'S CERTIFICATE.

I, John A. Canavan, Clerk of the United States District Court for the District of Massachusetts, do hereby certify that the foregoing is a true copy of the matter designated by the parties and constitutes the record on appeal in the cause entitled:

No. 52-154 Criminal.

THE UNITED STATES

v.

DANIEL SMITH,

EVA SMITH,

DEFENDANTS.

in said District Court determined.

In testimony whereof I hereunto set my hand and affix the seal of said Court, at Boston in said District, this day of November, 1953.

[Seal]

JOHN A. CANAVAN, *Clerk*

[fols. 257-258] IN THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

No. 4,792

(Repeat Title)

On January 7, 1954, this cause came on to be heard, and was fully heard by the Court, Honorable Calvert Magruder, Chief Judge, and Honorable Peter Woodbury and Honorable John P. Hartigan, Circuit Judges, sitting.

[fol. 259] IN THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

No. 4792

DANIEL SMITH, Defendant, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the
District of Massachusetts

Before Magruder, Chief Judge, and Woodbury and Hartigan, Circuit Judges.

W. Arthur Garrity, Jr., with whom Paul G. Connihan was on brief, for appellant.

W. Langdon Powers and Francis J. Di Mento, Assistant U. S. Attorneys, with whom Anthony Julian, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT—February 26, 1954

Hartigan, Circuit Judge. This is an appeal from a judgment entered in the United States District Court for the District of Massachusetts upon the verdict of a jury finding the appellant guilty on four counts of an indictment charging him with wilfully and knowingly attempting to defeat and evade a large part of the income tax due and [fol. 260] owing by him to the United States for the cal-

endar years 1946, 1947, 1948 and 1949, in violation of Sec. 145(b) of the Internal Revenue Code, 26 U.S.C. §145(b) ¹. The appellant was sentenced to consecutive terms of imprisonment of one year and one day on each count and to pay a fine of \$5,000.

The appellant and his wife, Eva Smith, were indicted jointly on five counts for filing false and fraudulent joint tax returns for the years 1946 to 1950 inclusive. The theory of the Government's case at the trial was that the joint net worth of the appellant and his wife was greater at the end than at the beginning of each year in issue, and that the source of their increased net worth was taxable income which exceeded that reported in their joint tax returns. In order to sustain these contentions, the Government introduced in evidence the joint tax returns of the appellant and his wife, a net worth statement signed by the appellant, verbal admissions by the appellant, and records of an annuity, bank and brokerage accounts, stocks, bonds, and real estate owned by the appellant and his wife. The annuity, all of the real estate, and the stocks and bonds were held in the name of Eva Smith. Twelve of the fourteen bank accounts were held in the name of Eva Smith alone or Eva Smith jointly with her brother. The latter testified that he had no interest in any of these accounts.

The Government then introduced a computation prepared by an agent of the Internal Revenue Bureau. This computation tended to show the net worth of the appellant and his

§ 145. Penalties

* * * * *

“(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.* Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.”

[fol. 261] wife at the beginning and end of each year in issue and substantially summarized the evidence the Government had previously presented. The Government, however, did not allocate in this computation the actual ownership of the various assets between the appellant and his wife.

At the conclusion of the presentation of the Government's evidence, the district court granted Eva Smith's motion for her acquittal and directed the jury to return a verdict of not guilty. After all the evidence was introduced the appellant moved for his acquittal on the five counts of the indictment. The court denied his motion as to the first four counts and granted it as to the fifth count covering the year 1950.

The appellant contends that his motion for acquittal should have been granted because there was not sufficient evidence for the jury either to fix his net worth at any base period or to show that a taxable source of income increased his net worth above what he reported in his tax returns for the years in issue.

The Government is not required to establish the exact amount of the appellant's unreported income, *United States v. Johnson*, 319 U. S. 503 (1943), and the case was properly submitted to the jury if there is sufficient evidence to warrant the jury finding beyond a reasonable doubt that the appellant willfully attempted to evade his income taxes. *Bell v. United States*, 185 F. 2d 302 (4 Cir. 1940), cert. denied 340 U. S. 930 (1951). Also, in our review of this issue we must view the evidence in a light most favorable to the Government. *Gendelman v. United States*, 191 F. 2d 993 (9 Cir. 1951), cert. denied 342 U. S. 909 (1952); *United States v. Yeoman-Henderson, Inc.*, 193 F. 2d 867 (7 Cir. 1952).

[fol. 262] The record reveals that an agent of the Internal Revenue Bureau had numerous discussions with the appellant's accountant concerning the preparation of a written statement showing appellant's net worth at the beginning and end of the years in issue. Such a net worth statement was prepared by the appellant's accountant without the aid of the revenue agent and was signed by the appellant. The statement and a check payable to the Collector of Internal Revenue were then delivered to the agent.

The appellant contends that the district court erred in admitting this statement and in failing to submit to the jury the question of the voluntariness of the statement. We find no merit in these contentions. There is no evidence that the appellant was in any way coerced or compelled to submit the statement. The statement, therefore, was properly admitted in evidence. *Wilson v. United States*, 162 U.S. 613 (1896). And since there was a complete absence of evidence of coercion or compulsion, no factual question on this issue was presented for the jury to determine. *Williams v. United States*, 189 F. 2d 693 (1951). There was, however, some conflict in the evidence as to whether or not the agent secured the statement by means of fraud or deceit. The district court, however, instructed the jury that if trickery, fraud or deceit were practiced upon the appellant by the Government to obtain the net worth statement, they were to reject all the evidence contained in such statement and all evidence that was obtained through it. *Denny v. United States*, 151 F. 2d 828 (4 Cir. 1945), cert. denied 327 U. S. 777 (1946); *Montgomery v. United States*, 203 F. 2d 887 (5 Cir. 1953).

The signed statement concluded with these words: "This statement of Net Worth and supporting schedules attached hereto, correctly and accurately represent to the best of my ability and recollection my true worth for the period [fol. 263] covered herein." The appellant contends that no significance was given to these words at the trial because it made no difference to the Government whether the appellant or his wife owned the assets representing the increase in net worth, and that it is "unfair" for the Government to rely on them in this appeal. The appellant further argues that these words were "probably a matter of form." The appellant, however, presented his evidence after Eva Smith had been acquitted and he then had ample opportunity to reveal the immateriality of these words. But he offered no evidence showing that they were "incidental", even though his accountant who prepared the statement took the stand as his witness. Furthermore, there is evidence that the appellant told agents of the Internal Revenue Bureau that *he* owned and paid for the real estate listed in his signed net worth statement.

The written and verbal statements of the appellant ac-

curately fixed his net worth as of December 31, 1945, and revealed substantial increases in his net worth above what he reported as taxable income in his tax returns for the years in issue.² The Government's evidence, therefore, is not based upon " * * * speculation and theorizing by the government's witnesses as to what the facts really are." *Demetree v. United States*, 207 F. 2d 892, 893 (5 Cir. 1953). See *Bryan v. United States*, 175 F. 2d 223 (5 Cir. 1949), aff'd, 338 U. S. 552 (1950); *United States v. Fenwick*, 177 F.2d 488 (7 Cir. 1949).

Also, there is evidence that the appellant told an agent of the Internal Revenue Bureau that late in 1945 or 1946 [fol. 264] he began operating the Union News Service which supplied racing information to about a dozen customers and that he received \$100 to \$250 a month from each customer. An agent testified that the appellant told him the money for the purchase of the Falmouth Bowling Club came from monies accumulated from the Union News Service, and that some of this money was not reported. The Government thus presented evidence of a taxable source of the appellant's increase in net worth. See *United States v. Chapman*, 168 F. 2d 997 (7 Cir. 1948), cert. denied 335 U. S. 853 (1948); *McFee v. United States*, 206 F. 2d 872 (9 Cir. 1955), petition for certiorari filed October 15, 1953.

The written and verbal statements of the appellant, however, do not constitute sufficient evidence for the submission of the case to the jury unless there is corroborating evidence of the corpus delicti. *Warszower v. United States*, 312 U. S. 342 (1941); *Calderon v. United States*, 207 F. 2d 377 (9 Cir. 1953), petition for certiorari filed February 4, 1954. But all the other evidence must be considered together with the statements of the appellant in determining whether or not there is sufficient evidence for the jury to find the appellant guilty beyond a reasonable doubt. *Bell v.*

	1946	1947	1948	1949
* Taxable income reported				
in tax returns	\$3,777.66	\$4,690.27	\$1,849.51	\$1,319.85
Increase in net worth specified in appellant's				
signed net worth				
statement	\$11,213.48	\$18,092.06	\$30,413.24	\$14,751.90

United States, supra; Davena v. United States, 198 F. 2d 230 (9 Cir. 1952), cert. denied 344 U.S. 878 (1952).

In the instant case there is ample corroborating evidence of the corpus delicti.

1. The appellant did not keep any records of his news service business. See *United States v. Hornstein*, 176 F. 2d 217 (7 Cir. 1949); *Bell v. United States, supra*.

2. A witness who is employed at the Office of the Collector of Internal Revenue and has custody of tax returns filed by Massachusetts taxpayers testified that no record of a return having been filed could be found for the years 1935 through and including 1939; that a non-taxable re-[fol. 265] turn was filed for the year 1940 and a taxable return was filed for 1941; that a non-taxable return was filed for 1942; that a non-assessable return was filed for 1943; and that a refundable return was filed for 1944. Between 1941 and 1945 the appellant worked in a package store for about \$40 a week and the appellant's wife was a housewife from 1943 until the end of 1950. Therefore, there is evidence from which the jury could infer that the appellant had not accumulated in prior years a sum greater than that specified for December 31, 1945, in his signed net worth statement. See *Schuermann v. United States*, 174 F. 2d 397 (8 Cir. 1949), cert. denied 338 U.S. 831 (1949); *Gariepy v. United States*, 189 F. 2d 459 (6 Cir. 1951).

3. The appellant did not include in his statement a bank account which substantially increased his net worth for the year 1946. This account was held in the name of Dean Muir and Janet Smith, but the appellant admits his ownership of it. See *Gendelman v. United States, supra; United States v. Chapman, supra*.

4. The failure of the appellant to offer any explanation for his increase in net worth may be considered by the jury in reaching its verdict. *Schuermann v. United States, supra; Jelaza v. United States*, 179 F. 2d 202 (4 Cir. 1950); *Remmer v. United States*, 205 F. 2d 277 (9 Cir. 1953) cert. granted. U.S. , November 16, 1953.

5. An agent of the Internal Revenue Bureau examined the Registry of Deeds for Worcester County and the Assessors' Office in the town of Shrewsbury. He then had numerous discussions with the appellant's accountant and

on two separate occasions agents held conferences with the appellant. An investigation was then made and an annuity, stocks, bank accounts, brokerage accounts, Government bonds, and real estate were discovered in the name of the appellant or his wife. Also, substantial payments for additions to the appellant's home were found. On the basis of this comprehensive investigation the Government produced evidence which clearly corroborated appellant's signed net worth statement. Compare *Bryan v. United States*, *supra*, with *Brodella v. United States*, 184 F. 2d 823 (6 Cir. 1950).

6. The appellant's brother-in-law testified that appellant operated a news service room from the latter part of 1945 to sometime in 1949 and that the appellant's wife had no occupation other than that of a housewife from 1943 through 1950. This testimony thus corroborated appellant's statements as to the source of his increased net worth. Also there was abundant evidence other than appellant's statements that almost all of these assets were acquired during the years here in issue. Therefore, that the appellant " * * * had large, unreported income was reinforced by proof which warranted the jury in finding that * * * the private expenditures * * * exceeded his available declared resources." *United States v. Johnson*, *supra*, at 517.

We find no merit in appellant's contention that the court's instructions to the jury were substantially prejudicial to the appellant and erroneous in law.

The appellant argues that the district court erred in failing to instruct the jury that the evidence of the above assets was admitted only against Eva Smith. When the evidence was introduced, however, the district court told the jury that further testimony might connect the appellant with these assets. And the evidence we have mentioned together with all the other evidence introduced, clearly was sufficient for the jury to infer appellant's ownership of the assets listed in his net worth statement. See *DeWitt v. United States*, 291 F. 995, 1002 (6 Cir. 1923), cert. denied 263 U. S. 714 (1923); *O'Connor v. United States*, 263 F. 2d 391 (4 Cir. 1953).

[fols. 267-268] The only remaining objection taken by the appellant to the charge was the failure of the district court to instruct the jury "that an increase in appellant's net

worth does not mean income." Considering the charge in its entirety, we find no merit in this objection. See *Gariopy v. United States, supra*, at p. 464.

The judgment of the district court is affirmed.

On the same day, February 26, 1954, the following judgment was entered:

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST
CIRCUIT

No. 4,792

(Repeat Title)

JUDGMENT—February 26, 1954

This cause came on to be heard on the record on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court: (S.) Roger A. Stinchfield, Clerk.

IN UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 4792

DANIEL SMITH, Defendant, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

DEFENDANT'S PETITION FOR REHEARING

Believing that the decision of this Honorable Court dated February 26, 1954 contains four fundamental errors of law, the defendant respectfully requests a rehearing.

The grounds for this request are as follows:

I. The grounds on which this Court bases its decision to sustain the conviction were not pressed by the prosecution at any stage of the proceedings, and defendant, therefore, never was afforded any opportunity to defend against them.

II. There is fundamental error in the failure of this Court, and of the trial court, to apply the proper rules of law to the question of the admissibility of the net worth statement.

III. Although this Court states that the net worth statement was submitted to the jury under proper instructions to accept or reject it, the decision ignores the real possibility that the jury in fact rejected the net worth statement and convicted the defendant on evidence which defendant has contended is irrelevant and non-probative, and upon which this Court has expressed no opinion.

IV. In the admission by the defendant of an increase in net worth of \$11,213.48 for the year 1946, on the basis of which the Court sustained his conviction for that year, there was an item of \$9,600.00 which the evidence proved to have been acquired prior to 1946.

Respectfully submitted, (S.) W. Arthur Garrity, Jr.,
Attorney for the Defendant.

CERTIFICATE

This petition is presented in good faith, and not for the purposes of delay, and is believed to be well founded in fact and law.

(S.) W. Arthur Garrity, Jr., Attorney for the Defendant.

[fol. 271] IN THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

No. 4,792

[Title omitted]

ORDER DENYING REHEARING— March 26, 1954

It is ordered that the petition for rehearing filed by appellant on March 12, 1954, be, and the same hereby is, denied.

By the Court: (S.) Roger A. Stinchfield, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST
CIRCUIT

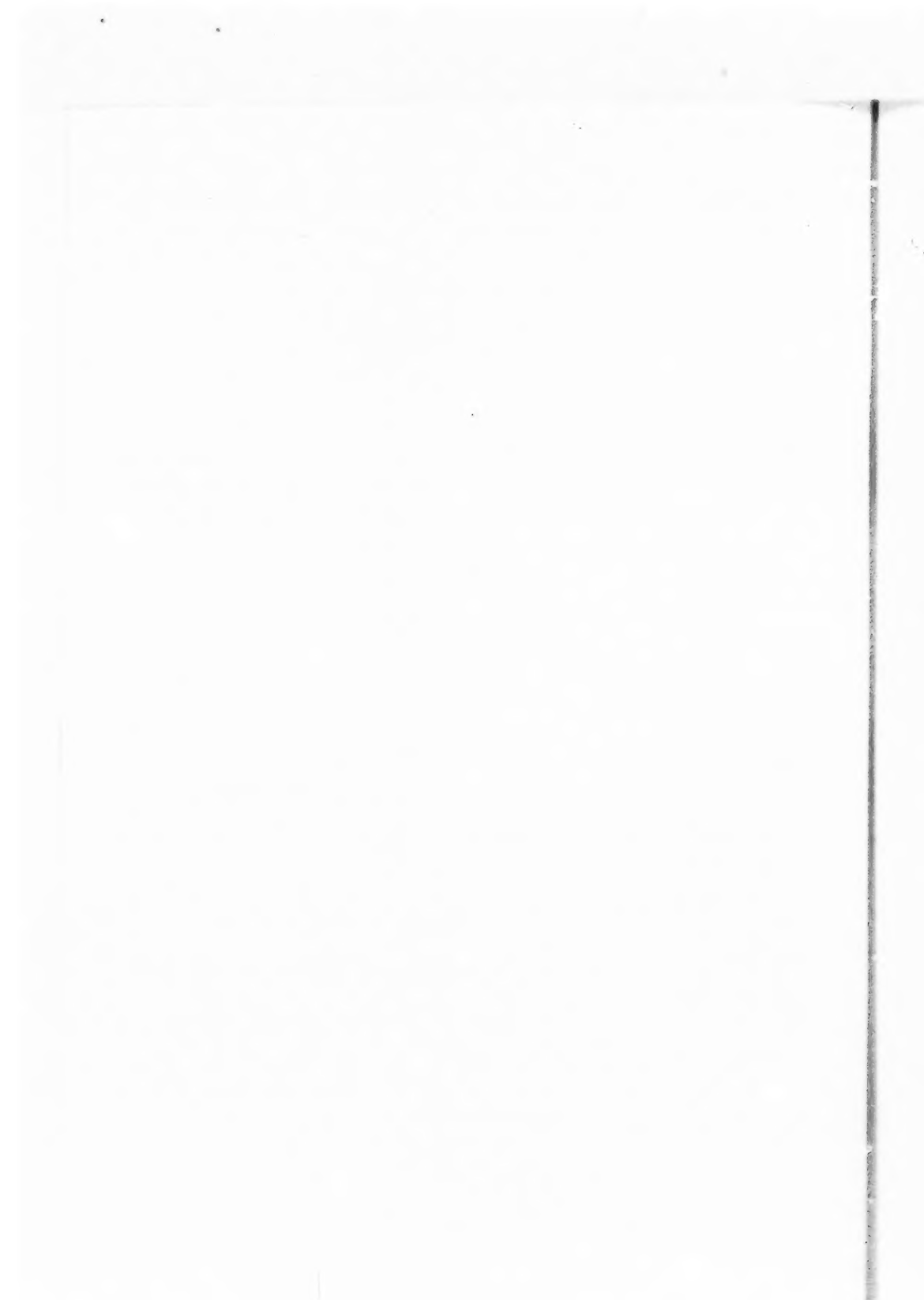
No. 4,792

[Title omitted]

ORDER STAYING MANDATE—March 30th, 1954

Thereafter, to wit, on March 30, 1954, mandate was stayed until further order of Court.

[fol. 272] Clerk's Certificate to foregoing transcript omitted in printing.



SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 726

DANIEL SMITH, Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed June 7, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5806)

Supreme Court of the United States.

No. ~~51~~
52

OCTOBER TERM, 1952

DANIEL SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIRST CIRCUIT.

RICHARD MAGUIRE,
Attorney for Petitioner.

W. ARTHUR GARRITY, JR.,
PAUL G. COUNIHAN,
Of Counsel.

March 26, 1954 (R. 267). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) and Rules 37 (b) and 45 (a) of the Federal Rules of Criminal Procedure.

Questions Presented.

1. For conviction in a net worth tax evasion case is independent evidence of a beginning net worth required, and, if so, was there such evidence in this case?

2. Was a financial statement submitted by the petitioner a confession, and was it correctly handled by the trial court and treated by the Court of Appeals as to (a) a preliminary hearing, (b) the question of inducement, and (c) the conclusiveness given to it by the opinion below?

3. Did the Court of Appeals ignore established standards of this Court in sustaining the conviction of the petitioner on a theory and an issue never advanced by the Government, and on which the jury received no instruction?

Statute Involved.

Section 145(b) of the Internal Revenue Code: 26 U.S.C. § 145(b)

§ 145 Penalties:

“(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.* Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon

conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Statement.

This is a net worth income tax evasion case in which the petitioner was indicted jointly with his wife on five counts for tax evasion by means of filing false and fraudulent returns for the years 1946 through 1950. After the trial court directed verdicts of acquittal for the wife on all five counts and for the petitioner on the fifth count, the petitioner was found guilty on the remaining four counts. The Court of Appeals affirmed the judgment of the District Court and thereafter denied a petition for rehearing.

The opinion of the Court of Appeals treats as the most important element in the case a financial statement (R. 231-234) headed "Daniel and Eva Smith", signed and sworn to by the petitioner as a representation of "my true worth" for the years 1946 through 1949. Considerable testimony during the trial related to the circumstances surrounding the submission of the statement to a Treasury Agent by the petitioner's accountant, the petitioner contending in part that the Government had practiced fraud and deceit in obtaining it from him. The trial judge admitted it into evidence with the caution to the jury that it would have this fraud question to decide as a fact, (R. 123-124), and in the charge the jury was instructed to reject the statement if it found that "trickery, fraud or deceit" had been practiced on the petitioner or his accountant in order to obtain the statement (R. 210). The petitioner also contended that this financial statement was a confession and that he was entitled to a preliminary hearing in the absence of the jury in order for the judge to determine whether or not its

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Supreme Court of the United States.

No.

OCTOBER TERM, 1953.

DANIEL SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner, Daniel Smith, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on February 26, 1954.

Opinion Below.

The opinion of the Court of Appeals (R. 257) is reported in 210 F.2d 496.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on February 26, 1954 (R. 264). A petition for rehearing filed on March 12, 1954 (R. 265-266) was denied on

delivery to the Government had been accomplished by such an inducement as would render it inadmissible (R. 124-125). The request for a preliminary hearing was opposed by the Government on the ground that it was not a confession but an "admission against interest", (R. 125); the trial judge then let it stand conditionally admitted as it was, (R. 126) and later instructed the jury only on the question of fraud (R. 210).

This statement, as the Court of Appeals pointed out, if given its full import, "accurately fixed [petitioner's] net worth as of December 31, 1945, and revealed substantial increases in his net worth above what he reported as taxable income in his tax returns for the years in issue." (R. 260-261).

There was convincing evidence that the statement was delivered only in reliance on criminal immunity from the tax evasions disclosed therein. The Treasury Agent, McMahon, who obtained the statement from Delaney, the petitioner's accountant and a former Treasury Agent, knew that Delaney was going to give him a check along with the statement some time prior to its delivery (R. 90-92). On June 13, 1952, McMahon accepted the statement and a check for \$15,000 from Delaney, (R. 66-67); on June 14, 1952, after consulting with superiors and photostating the check, he mailed it back to Delaney, stating in the covering letter:

"As you already know, where possible prosecution may be recommended, no payment of taxes is accepted until that feature of the investigation is ended." (R. 94, 235).

For the purpose of fixing the net worth of the petitioner at the start of the period involved, the opinion of the Court of Appeals relied primarily on the financial statement. As

corroboration for the starting net worth, the opinion relied on (1) evidence relating to tax returns filed immediately prior to the period, (2) evidence that from 1941 to 1945 the petitioner had worked for \$40 a week, and (3) evidence that the petitioner's wife was a housewife from 1943 to the end of 1950 (R. 262). The testimony as to the tax returns was given by a government employee having custody of tax returns, no amounts of income were mentioned, the returns themselves had apparently been destroyed, and the evidence was only to the effect that no records of returns for 1936 through 1939 were found, non-taxable returns were filed for 1940 and 1942, a taxable return for 1941, a non-assessable return for 1943 and a refundable return for 1944 (R. 26-27). The evidence as to the petitioner's income from 1941 to 1945 was itself the oral admission of the petitioner to a Treasury Agent (R. 63). The evidence that his wife was a housewife does not seem very probative on the issue, especially in view of the trial judge's finding that the Government had completely failed to establish a starting position as against her (R. 184).

The Government stated at a pretrial hearing that it had no evidence or proof by which it could segregate income between the two defendants (R. 13-14). The Government, of course, had the net worth statement submitted by the petitioner in its possession at that time. At the trial, in addition to tax returns and written and oral admissions of petitioner, the bulk of the testimony related to assets in the name of Eva Smith and computations of tax made thereon; the Government made no effort to allocate the actual ownership as between the two defendants (R. 259) and, in fact, several times seemed to concede that assets standing in Eva's name were actually owned by her (R. 42, 46, 118). In the trial judge's charge to the jury he clearly stated that "the Government has set out to show you

through circumstantial evidence that this crime or these crimes have been committed," (R. 211); no reference was made to the petitioner's net worth statement as a confession, and nothing was said in any manner about corroborating evidence. During the charge, as well as during the lengthy testimony of Government expert witness Toohey and arguments of counsel, the petitioner's net worth statement was not before the jury, but a blackboard was. On this blackboard had been recorded all of the evidence as to assets, showing a total increase in net worth during the indictment period of \$232,966.72 (R. 216-217). If anyone can ever be certain about what goes on in the minds of twelve people, it is certain that the jurors convicted the petitioner on the basis of the evidence recorded on that blackboard.

The financial statement which had been submitted by the petitioner was used by the Government to establish a beginning net worth against the petitioner; it seems never to have been conceived of at the trial by either the Government or the trial judge as establishing the basic elements of the crimes alleged. In fact, the Government vigorously rejected the argument that it was a confession (R. 135).

The Court of Appeals, however, as has been pointed out, took a different view and found in the statement almost everything needed to sustain the conviction except corroboration. The Court of Appeals sustained the conviction on a theory never advanced by the Government at any stage of the proceedings. The closest the Government ever came to the position adopted by the Court of Appeals was in its brief before that court. There, for the first time in the case, mention was made of the averment by the petitioner that it was an accurate representation of "my true worth" and some significance was attached to it. The petitioner had contended that the evidence was insufficient to sustain his

conviction because evidence of Eva Smith's ownership of assets had not been made relevant to the issue of the guilt of the petitioner; in fact, such evidence had been limited to Eva Smith at times when counsel for the petitioner had specifically requested it, (R. 29, 106), and, upon counsel's observation that he would have the same objections throughout, the trial judge had told him "All right. I will protect your interests each time." (R. 30). The Government in its brief pointed to the fact that many of the assets listed on the financial statement were in Eva Smith's name, and sought by the use of the "my true worth" phrase to justify an inference that all of Eva Smith's assets actually belonged to the petitioner. However, it still clung to the position that the case had been proved by the evidence of assets which had been introduced.

Reasons for Granting the Writ.

Introduction.

The petitioner advances to this Court three principal reasons for granting the writ in this case.

First: The opinion below is in direct conflict with the opinion of the Court of Appeals for the Ninth Circuit in *Calderon v. United States*, 207 F.2d 377 (1953), petition for certiorari filed February 4, 1954. It is submitted that the court which decided that case would have reversed the conviction of the petitioner for the lack of adequate corroboration of the beginning net worth.

Second: The procedure and the standards adopted in the admission of the financial statement and its submission to the jury conflict with well-established precedents of this Court in that:

(a) The failure of the trial judge to hold a preliminary hearing in the absence of the jury on the admissibility of the statement conflicts with settled rules of this Court, *e.g. Carignan v. United States*, 342 U.S. 36, 38 (1951).

(b) Both the trial court and the Court of Appeals ignored the rule that a confession is inadmissible if obtained by reasonable reliance on a promise of immunity.

(c) In stating that the statement was submitted to the jury on proper instructions, the opinion of the Court of Appeals failed to consider that the jury, under the instructions given to it, may have convicted the petitioner while rejecting the statement and, therefore, was in error in failing to examine the sufficiency of other evidence. *Cf. Stein v. New York*, 346 U.S. 156 (1953)

Third: The theory on which the Court of Appeals sustained the conviction of the petitioner was not the theory on which the case was tried or on which the jury was instructed. The opinion below is in clear conflict with opinions of this Court, *e.g. Nye & Nissen v. United States*, 336 U.S. 613 (1949) and of the Court of Appeals for the Sixth Circuit in *Pearson v. United States*, 192 F.2d 681 (1951).

Corroboration of the beginning net worth.

In *Calderon v. United States*, 207 F.2d 377, the Ninth Circuit Court of Appeals reversed a conviction in a net worth tax case for lack of independent proof of the cash on hand at the beginning of the period involved, finding a sworn statement given by the defendant to tax officials and to his accountant insufficient. Here there are also a

sworn statement and oral admissions to tax officials, there is no statement to an accountant, and there is in addition only the extremely vague and inconclusive testimony as to the tax returns. It is submitted that this tax return evidence, set out *supra* at page 5, is not sufficiently probative to supply the necessary corroboration.

Use of the returns as corroboration is in any event in conflict with *Spriggs v. United States*, 198 F.2d 782 (9 Cir. 1952), as it is there stated that all extrajudicial statements require corroboration, and the returns themselves are extrajudicial statements.

The financial statement: its admission in evidence and its submission to the jury.

The trial judge may have treated the contentions of the petitioner as to the admissibility of petitioner's financial statement as he did because of the argument of the Government at the trial that it was merely an admission and because of his own and the Government's conception of the case as one to be proven by circumstantial evidence. This cannot, however, be the rationale of the opinion of the Court of Appeals. Not only is it evident from a reading of the opinion that the court considered it as a confession, but the opinion also cites in its consideration of the point two cases dealing explicitly and unmistakably with confessions, *Wilson v. United States*, 162 U.S. 513 (1896) and *Williams v. United States*, 189 F.2d 693 (1951). The opinion, therefore, must stand, if this Court does not see fit to review it, as authority on the admissibility of confessions.

The first question raised by the opinion is whether or not the admission of confessions induced by a promise is to follow the same procedure as the admission of coerced confessions. It is abundantly clear that a defendant, who claims that a confession was coerced from him, is entitled to a

preliminary hearing on its admissibility before the trial judge in the absence of the jury at which he may testify, *Carignan v. United States*, 342 U.S. 36, 38 (1951). It is submitted by the petitioner that the same hearing should be accorded a defendant who claims that the confession was induced by a promise of immunity. The confessions are in both circumstances equally untrustworthy and prejudicial, perhaps even more prejudicial where given voluntarily to secure the promised immunity, and no distinction warranting a difference in treatment has been found in the opinions of this Court.

Even more important, however, in the development of the law in this area is the fact that the opinion regards coercion or compulsion as the only basis for the exclusion of a confession. "There is no evidence that the appellant was in any way coerced or compelled to submit the statement. The statement, therefore, was properly admitted in evidence. *Wilson v. United States*, 162 U.S. 613 (1896)". (R. 260) The opinion in this manner deals with the question of admissibility, and nowhere mentions the petitioner's contentions as to the inducement for the confession.

Citation of authority for the proposition that a confession induced by reasonable reliance on a promise of immunity is inadmissible does not seem necessary. The *Wilson* case itself states that the test of admissibility is that the confession be made "without compulsion or inducement of any sort". 162 U.S. at 623. If this rule of law is to be changed so drastically, it should be done by this Court; if it is not to be changed, the opinion below should be reviewed and corrected. In either event the writ should be granted.

Finally, the opinion below has ignored the views of this Court as expressed in *Stein v. New York*, 346 U.S. 156 (1953), where the Court found it necessary extensively to consider other evidence where the defendant had contended that a confession had been improperly admitted.

In its opinion in this case the Court of Appeals determined that there was a conflict in evidence as to whether the statement was obtained from the petitioner through fraud or deceit on the part of the agent. It was then stated that the statement was, however, submitted to the jury under instructions that they might reject it (R. 260). As the jury was *not* instructed that it would have to acquit the petitioner if it rejected the statement, it is impossible to say whether or not the statement was in fact rejected. Especially since the case was submitted to the jury as one of circumstantial evidence, it is probable that the jury convicted on that circumstantial evidence, and failure to examine that evidence for probative value, relevance, and sufficiency is a refusal to grant to the petitioner the review of his conviction to which he is entitled.

The error of the Court of Appeals lies in the fact that it is not a question of the jury believing or disbelieving some evidence, in which case the appellate court would be entitled to look at the evidence in the light most favorable to the prosecution, but it is rather a question of whether or not the evidence was admissible. It may be that the conviction was sustained on the basis of evidence which the jury found to be inadmissible.

Since this point was apparently not made sufficiently clear in *Stein v. New York*, supra, although it is implicit in that opinion, it is submitted that the Court should grant the writ in order to correct the inconsistent view taken by the Court of Appeals.

The variance between the theory of the trial court and the theory of the Court of Appeals.

The opinion of the Court of Appeals makes it clear that the conviction was there sustained on the basis that the petitioner's net worth statement constituted a confession

and that there was sufficient corroborating evidence of the confession to take the case to the jury. It is equally clear from the record of the trial that the case was actually not so submitted to the jury and that, although the evidence on which the Court of Appeals relied was in the case, it was not on that evidence that the jury returned the conviction.

The petitioner realizes that it is not the function of this Court, especially at this stage of the proceedings, to examine very closely into the record. It is submitted, however, that there is no real dispute as to the manner in which the case was presented to the jury, and that the variance between the basis for conviction as seen by the judge and prosecution at the trial and the view taken by the Court of Appeals raises a clear question of law.

In *Nye & Nissen v. United States*, 336 U.S. 613 (1949), the defendant had been convicted of a conspiracy and of several substantive offenses. The case had been tried and submitted to the jury on the theory that the defendant had been an aider and abettor of the substantive offenses. The Court of Appeals, however, sustained the convictions on the theory that these offenses were committed in furtherance of the conspiracy and that, therefore, the defendant could be found guilty of committing them even though he did no more than join the conspiracy. The defendant contended before this Court that this was erroneous for the reason that a verdict on that theory would require submission of fact issues to the jury which were not submitted to it. Although the Court was divided five to four, all of the justices agreed that the defendant's contention was correct, the split coming only on the propriety of affirming on the aiding and abetting theory originally submitted to the jury by the trial judge.

There was absolutely nothing in the charge to the jury in this case, (R. 207-212), about the weight to be accorded

confession testimony or the amount of corroboration required. The case was submitted to the jury only as one based on circumstantial evidence. The opinion of the Court of Appeals is, therefore, in clear conflict with the opinion of this Court in the *Nye & Nissen* case.

The opinion below is also in conflict with *Pearson v. United States*, 192 F.2d 681 (6 Cir. 1951) where the court refused to sustain a conviction on a theory advanced by the Government for the first time on appeal, primarily on the ground that the charge to the jury did not cover properly the elements of guilt under the new theory.

Finally, the Court's attention must be called to the treatment of the phrase "my true worth" in the petitioner's financial statement. It is clear, especially as the statement was headed on its cover and on each of its pages "Daniel and Eva Smith", that the opinion of the Court of Appeals could have been written as it was only by relying heavily on that phrase to establish that the petitioner had himself realized substantial increases in his net worth above that which had been reported in his tax returns. But this phrase appears in the record prior to the Court of Appeals opinion only in the exhibit itself (R. 231). The phrase was never mentioned at the trial. The judge ignored it completely in the charge to the jury. The petitioner could have had no reason to suspect that any significance would be attached to it in view of the Government's manifest reliance on the statement only to establish the beginning net worth of the defendants. In *Shepard v. United States*, 290 U.S. 96 at 103 (1933), Mr. Justice Cardozo strongly indicates the fundamental unfairness of using testimony "in an appellate court as though admitted for a different purpose, unavowed and unsuspected." Here the petitioner was given

no reason at any stage of the proceedings from the hearing on the Bill of Particulars to the charge to the jury to suspect that the phrase "my true worth" would turn out to be the keystone in the case against him.

Conclusion.

For the reasons advanced herein, it is respectfully submitted that the Court should grant the writ of certiorari.

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W. ARTHUR GARRITY, JR.,
PAUL G. COUNIHAN,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1954

No. 52

DANIEL SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

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STATUTE INVOLVED

Internal Revenue Code:

Sec. 145. Penalties

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*---

Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

26 U.S.C. (1946 ed.) Sec. 145 (b)

(This section was superseded by sections 7201 to 7203 of the Internal Revenue Code of 1954.)

QUESTIONS PRESENTED

1. Was the net worth statement signed by the petitioner adequately corroborated in respect to the starting net worth?

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(This section was superseded by sections 7201 to 7203 of the Internal Revenue Code of 1954.)

QUESTIONS PRESENTED

1. Was the net worth statement signed by the petitioner adequately corroborated in respect to the starting net worth?

2. Was the net worth statement signed by the petitioner admissible in evidence, and was the failure of the trial judge to hold a preliminary hearing on its admissibility in the absence of the jury improper procedure?

3. Was the Court of Appeals in error in basing the affirmance of the conviction on the statement, which may have been rejected by the jury, without considering the sufficiency of the other evidence?

4. Did the Court of Appeals ignore established standards of this Court in sustaining the conviction of the petitioner on a theory and an issue never advanced in the trial court and on which the jury received no instructions.

STATEMENT OF THE CASE

The petitioner and his wife Eva were indicted jointly (R. 5) in the United States District Court for the District of Massachusetts for violations of Section 145 (b) of the Internal Revenue Code for each of the calendar years 1946 to 1950 inclusive. Each count of the indictment alleged, in part, that the defendants did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by them to the United States of America by filing a false and fraudulent tax return wherein they stated that their total income for a certain calendar year was a certain amount, whereas they well knew that their net income was a certain larger amount upon which they owed an income tax larger than that reported. In answer to motions for particulars filed by the defendants, the United States Attorney filed answers stating that the United States relied upon circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion for each year (R. 9). These answers made the case what is known as a net worth case. It is believed that this case was the first net worth case

tried in the United States Court for the District of Massachusetts and also the first such case decided by the United States Court of Appeals for the First Circuit.

At the trial, the evidence on the issue of whether or not the petitioner received income beyond that reported on the joint returns of himself and his wife was entirely circumstantial, except for some uncertain testimony by a treasury agent as to an inconclusive verbal admission (R. 62). There was no direct evidence whatsoever of receipt by the petitioner of specific items of income which were omitted from pertinent tax returns. The evidence on the issue of whether or not the petitioner's net worth increased from year to year was entirely circumstantial, inasmuch as the net worth statement signed by the petitioner was treated at the trial as a joint statement (Govt. Ex. 20, R. 42, 123, 231-234). The use and proper characterization of that net worth statement is hereinafter considered in detail. The trial judge's charge to the jury left no doubt that the Government's case was built upon circumstantial evidence (R. 209, 211).

The joint nature of the charges stated in the indictment dominated the trial from start to finish, in that the prosecution and defense contested continually about the legal propriety of prosecuting the petitioner and his wife as if they were an entity by reason of their having filed joint tax returns (R. 12-14, 139-149, 206). The Government contended that where a return is filed jointly the amount of alleged unreported income of each co-defendant is not material to the issues (R. 12-13). It did not attempt to establish increases in the net worths of the individual co-defendants, but relied upon alleged increases in their joint net worth (R. 158, 166), as stated in the opinion of the Court of Appeals (R. 258). These joint increases were computed in detail on a blackboard which was placed before the jury (R. 217) and were charged against both defendants (R. 174).

The Government offered the testimony of twenty-six witnesses (R. i, ii), twenty-three of whom testified concerning banking transactions, acquisition of assets, and expenditures by the defendants. The other three witnesses were Treasury employees, one a special agent, one a revenue agent and the third a custodian of official records. Eleven categories of assets were listed on a blackboard which was placed before the jury (R. 217). The figures designated "Cash in Banks" were totals as of the end of each year of fourteen bank accounts which were listed on another blackboard (R. 218). Government evidence also described stocks and bonds bought through a brokerage firm, stock in a trust company bought at the time of its organization, U. S. Government bonds, a paid-up annuity purchased from the John Hancock Life Insurance Company, a restaurant whose corporate name was the Falmouth Bowling Club, Inc., a drug store, five parcels of real estate, furniture, autos and mink coats. Increases in the defendants' joint net worth as computed on the blackboard (R. 217) amounted to \$30,553.92 for 1946, \$45,877.12 for 1947, \$54,869.48 for 1948 and \$65,389.23 for 1949. No figures were included for cash on hand.

The petitioner's wife Eva owned all the assets, with three exceptions: a bank account in the Worcester Mechanics Savings Bank (R. 36, 38), a brokerage account at Paine, Webber, Jackson & Curtis (R. 117-120) and a parcel of real estate on Williams Street (R. 131). The evidence of ownership by Eva was usually incidental to testimony about dates and costs. But oftentimes it was substantial and definite: regarding her bank accounts, witness George turned the proceeds over to her and acted for her accommodation (R. 40); regarding the Valley Trust Company stock, witness Taylor discussed the investment only with her (R. 114); regarding the drug store, Eva was the partner

and received such distribution of profits as was made (R. 112, 114); regarding the paid-up annuity, the salesman "sold Eva" (R. 53); regarding the mink coats, they were paid for by a check charged against Eva's checking account (R. 34, 105). The only purchase with which the petitioner was connected was that of the Falmouth Bowling Club, in which instance he participated in the negotiations and contributed \$7,300.00 which was withdrawn from his savings account (R. 36, 48, 49, 110, 111). Regarding the securities in Eva's brokerage account, they were owned and bought by her, according to a stipulation between counsel stated to the trial judge and jury by the prosecuting attorney (R. 118). At no time did the prosecution challenge the fact of ownership by Eva of the assets of which she had title. Nor did it in any way endeavor to show that her ownership was nominal rather than beneficial.

Other Government evidence related to tax returns filed by the defendants, admissions made by the petitioner during two interviews with treasury agents and the circumstances surrounding delivery to an agent of a net worth statement signed by the petitioner together with a check payable to the Collector of Internal Revenue in the amount of \$15,000.00.

The joint returns of Mr. and Mrs. Smith were marked Exhibits 1-4 for the years 1946-49 respectively (R. 26, 219-229). For years prior to 1945, a search disclosed no returns for 1936-39, non-taxable returns for 1940 and 1942, a taxable return for 1941, a non-assessable return for 1943 and a refundable return for 1944 (R. 26-27).

The first of two interviews with the petitioner was on April 15, 1951 at special agent McMahon's office (R. 96). The petitioner was accompanied by his accountant Delaney. There was no stenographer present; the petitioner was not represented by counsel; the agent did not administer an

oath (R. 97). Its general purpose was to get the method of operation and background of the news service operated by the petitioner; McMahon didn't go into any detail as to the assets owned by the petitioner at the beginning of any particular period (R. 99). The petitioner listed about a dozen customers who purchased racing information from him (R. 61), each of whom was charged from \$100 to \$250 per month for the service (R. 103).¹ During the time his predecessor Coan ran the service, petitioner had been the manager and treasurer (R. 63, 64). No bookkeeping records were kept (R. 61). Coan died in 1945 (R. 62, 65). Regarding the source of the funds invested in the Falmouth Bowling Club, petitioner said it was from moneys accumulated from the news service. The witness added, "And I think I brought up the point were these amounts that he had reported on his tax return, and his answer was that some of the amounts were not reported" (R. 62).

The second of the two interviews was on July 17, 1951 at the same location, but by different agents, Cortese and Toohey (R. 127). Since the time of the prior interview with McMahon, the petitioner's accountant had delivered to McMahon the net worth statement signed by the petitioner (Govt. Ex. 20, R. 42, 66, 123, 231-234) and the questioning related chiefly to the real estate values and bank accounts listed in the statement (R. 130, 131). The testimony on this subject was given by agent Toohey. It was elicited by the prosecuting attorney by questions phrased in terms of the masculine singular pronoun "he", but the agent's testimony was usually in the passive voice and gave no indication whether the expenditure was made by the peti-

¹ Gross income from the news service reported on the tax returns was as follows:

1946	\$22,100	(Exh. 1, R. 26, 220)
1947	25,350	(Exh. 2, R. 26, 222)
1948	29,640	(Exh. 3, R. 26, 226)

tioner or his wife or jointly by both of them (R. 131-137).²

The net worth statement signed by the petitioner (Govt. Ex. 20, R. 42, 66, 123, 231-234) was one of five pages bound together and enclosed in covers, the front cover and each page reading "DANIEL AND EVA SMITH".³ The circumstances of its preparation and delivery to agent McMahon were the subject of considerable testimony. It was delivered to McMahon by witness Delaney, an accountant representing the petitioner, on June 13, 1951 (R. 93, 190). McMahon had been assigned to investigate Daniel and Eva Smith on October 13, 1950 (R. 58). He had his first conference with Delaney with reference to the case on December 13, 1950 (R. 72). During the next six months, McMahon conferred with Delaney seven times (January 16, R. 73; March 28, R. 74; April 2, R. 75, 87; April 11, R. 75; April 30, R. 60, 69; May 24, R. 76; and June 11, R. 90, 91) and spoke with him on the telephone on six occasions (January 15, R. 73; March 20, R. 74; March 26, R. 87; May 16, R. 76; May 23, R. 73 and June 11, R. 91, 189). There may have

² For example, agent Toohey's complete testimony pertaining to real estate on St. James Street was as follows (R. 132):

Q. Did you inquire about any other real estate? A. 16 St. James Street.

Q. And what did you ask him about that property? A. The type of property, number of rooms, furniture.

Q. Did you ask him what he paid for it? A. I did.

Q. What did he tell you with reference to the questions that you asked him? A. He stated that there were seven rooms, new furniture, single house, cost \$9,600, paid \$1,000, which was returned to cover the repairs to be made but never paid out; bought from Lucy, mortgage was to Co-Operative Bank, about \$8,000; actual equity about \$1,000 cash; no mortgage on it now; does not know when paid; bought direct from owner.

Q. Did you ask him anything else about that property? A. Not that property.

³ The covers and the first of the five pages, a table of contents, do not appear in the printed record, although the entire exhibit was designated (R. 253); by stipulation of counsel, the original exhibit in its entirety was transmitted to the Court of Appeals (R. 255).

been other conferences or phone conversations with Delaney which McMahon did not note in his diary (R. 68, 92).

Early in the course of the negotiations between McMahon and Delaney, at least prior to March 20 (R. 74), McMahon asked Delaney to prepare the net worth statement (R. 199, 200). On March 26, the figures were ready except for some adjustment of stock transactions (R. 87). On April 2, the petitioner came to Delaney's office to go over the figures (R. 87). On April 11, Delaney advised McMahon that the figures were ready and that they included no cash at the beginning (R. 75). On that date, they also made the appointment for the interview on April 30 when the petitioner made the admission about which McMahon testified.

About three weeks after the interview, on May 24, Delaney took his work papers in to McMahon's office and showed them to him (R. 77, 78, 188). Since the papers presented to McMahon at that time contained no totals of the taxes and penalties computed thereon for each year by Delaney on the basis of the net worth figures, McMahon himself added the figures on an adding machine and arrived at totals of approximately \$18,000 tax and \$9,000 fraud penalty, for a combined total of approximately \$28,000. (R. 85, 86). McMahon knew that a fraud penalty was included in the liability as computed by Delaney (R. 83, 86), who said he would have the statement in final form and signed by May 29 (R. 86).

Following this conference, McMahon spoke to special agent James Sullivan, a supervisor to whom McMahon had reported at least twice previously during his handling of the case (R. 74, 75), and noted in his diary under May 24 "No 870's." A form 870 is an agreement to the assessment of the tax (R. 181). It is executed at the end of an investigation if the taxpayer agrees with the figure (R. 76). McMahon never discussed the subject of a form 870 with Delaney (R. 187).

Delaney did not return until the morning of June 11, when he had the statement with him, typewritten and bound but not executed (R. 188, 197, 89). McMahon asked Delaney if the petitioner would sign the statement and Delaney replied that he did not know but that he had an office appointment with Mr. Smith at one o'clock and that he would ask him then (R. 188). While conferring with Mr. Smith, Delaney received a phone call from McMahon asking if Smith would be willing to submit a check with the net worth statement (R. 189). Delaney could remember no specific amount mentioned (R. 189), only that it was to be approximately the amount of the tax (R. 189), but McMahon testified on the basis of a memorandum made by him (R. 89) that Delaney told him he would get a check for \$15,000 and would deliver it with the statement (R. 90-92). Two days later, Delaney delivered to McMahon the statement, signed and notarized (R. 66, 93), together with a treasurer's check of the Guaranty Bank & Trust Company dated June 12, 1951 payable to the Collector of Internal Revenue in the amount of \$15,000 (R. 67, 93).

On the following day, June 14, after conferring with his group chief and other Treasury Department personnel, McMahon mailed the check back to Delaney and kept the net worth statement (R. 94). McMahon's covering letter, (Def. Ex. A; R. 94, 235), stated in part, "As you already know, where possible prosecution may be recommended, no payment of taxes is accepted until that feature of the investigation is decided."

On June 15, after receiving the letter, Delaney phoned McMahon asking him what the story was, and McMahon stated that he was sorry and that the case was now out of his hands (R. 85, 191, 202). He referred Delaney to another special agent (R. 191), as he did in his letter of the 14th. Up to the day when the statement and check were delivered, June 13, the case was assigned to McMahon alone (R. 95).

After the case had been transferred to other agents, at a conference on July 17, McMahon told Delaney that he was sorry that Delaney got the impression of a voluntary disclosure (R. 95-96).

Delaney had himself been a special agent of the Treasury for a period of about four years (R. 185-186). He and McMahon had worked in the same office; they knew each other previous to the Smith investigation (R. 59). He was familiar with the method in which net worth cases were handled in the Department from an investigative standpoint (R. 198). But he had never handled a net worth case while employed by the Government (R. 198) and it was at McMahon's solicitation that he prepared and submitted the statement signed by the petitioner (R. 199, 200). He believed that acceptance of a check constituted closing of the case (R. 203), at least as far as possible criminal prosecution was concerned (R. 235). He expected that acceptance of a check by McMahon would end this case (R. 203). At a "heated" conference on July 17, when tempers were high (R. 204), Delaney stated that there had been an understanding that the case would be closed if a check were submitted (R. 128), that if he had any doubt about the case being closed on the basis of the net worth statement he would not have had Mr. Smith sign it (R. 95-96), and that he was of the opinion that the case was closed (R. 191).

On the basis of the figures in the net worth statement, the Smiths owed the United States approximately \$28,000 in taxes and penalties over and above the taxes paid by them for the years 1946 to 1949, inclusive (R. 201). But Delaney was not satisfied that this amount was actually owing; figures missing from the statement would decrease the amount of the tax liability (R. 201). There was always talk of cash between him and McMahon (R. 194, 75). Mr. Smith felt that cash on hand should have been included (R. 195).

The folder containing the statement signed by the petitioner was marked for identification (R. 42) and tentatively excluded once (R. 66) before being admitted against the petitioner only and over his objections prior to the testimony of the final Government witness, agent Toohey (R. 123-124).⁴ One of the petitioner's objections to its admissibility was that it was a confession and the judge should have a *voir dire* before admitting it. The judge overruled the objection on the ground that the statement was not a confession. This ruling had been made at one of the off-the-record bench or lobby conferences and was not made as such on the record. However, the prosecuting attorney referred to the ruling and stated it unequivocally (R. 125).

The folder containing the net worth statement signed by the petitioner was utilized by the prosecution during agent Toohey's testimony in two ways: (a) first, the agent derived some of the figures in the Government's computation from the folder (R. 183); the automobile figures came from it (R. 163) and the living expense figures used in computing the alleged tax liability came from a page of it other than the one containing the net worth statement (R. 157, 233);⁵ (b) second, the prosecutor had the agent contrast certain figures in the Government computation on the blackboard with corresponding figures in Exhibit 20 (R. 153-156). The

⁴ At the time of its admission, the trial judge stated to the jury "that a written statement such as that which is obtained either as a result of promise of immunity or gain or one induced by fear or by threat in the Federal courts is not admissible as evidence * * * but I think that you can gather from the evidence and the cross-examination that has gone on up to now and probably from some future evidence that counsel will argue that Smith was induced to give this statement by reason of deceit or fraud." (R. 123)

⁵ In this connection, the prosecutor had stated immediately prior to the agent's testimony, "I want to use that with my revenue agent, because he is going to take certain facts out of that in determining real estate values and other factors." (R. 125-126).

prosecutor started a figure-by-figure comparison by having the agent read the "cash in banks" figures in Exhibit 20 while he pointed to corresponding figures on the blackboard, but, at the suggestion of the judge, thereafter contrasted only the totals for each year.

On two occasions between admission in evidence of Exhibit 20 and the charge to the jury, the trial judge commented upon it in relation to the law applicable to the case as a whole. The first came during the prosecutor's reply to defense counsel's extended statement (R. 138-146) of the grounds for defense objections (R. 150) to a joint computation of alleged net worth increases. The judge stated that the prosecution was trying to prove too much by the net worth statement signed by the petitioner and still had stumbling blocks ahead, possibly with respect to both defendants (R. 149). Second, in directing a not guilty verdict in the case against Eva, the judge stated that in the case of Eva, no base to start from had been established (R. 184).

The defense offered the testimony of two accountants: Delaney, who testified concerning the preparation and delivery of Exhibit 20 (R. 185-205) and Rowe, whose testimony pertained entirely to the year 1950 and therefore does not appear in the record. The main defense, however, was not testimonial but rather legal. As explained at length in the absence of the jury, defense counsel believed that failure to allocate the assets and expenditures between the co-defendants and computing their tax liability on a joint basis were fatal errors (R. 138-146).

The petitioner filed a motion for judgment of acquittal on each of the five counts alleged in the indictment at the conclusion of the Government's evidence (R. 15); he renewed this motion at the close of all the evidence;⁶ a hearing

⁶ The petitioner's renewal of his motion for judgment of acquittal (R. 15) was designated for inclusion in the record (R. 252) but not

on the motion was held in the absence of the jury and the matter was taken under advisement (R. 3); the motion was allowed as to the fifth count and denied as to the first four counts (R. 16, 206, 207). Following the hearing on the motion for judgment for acquittal, but after the trial judge left the bench, the petitioner filed with the clerk, who had not left the courtroom, his requests for instructions (R. 3, 16, 206).

Before the arguments and charge, counsel for the petitioner requested that the blackboard on which agent Toohey had written his computation be removed from the view of the jury (R. 206) and objected to the court's denial of this request (R. 207). Three blackboards were used by the prosecution during the trial: (a) the first contained the balances in the various bank accounts and the war bonds purchased; it was filled out by the prosecuting attorney as each bank witness testified (R. 218); (b) a second contained the cost figures of most of the assets acquired by the defendants; it was filled out by the prosecuting attorney as the particular witness testified (R. 44, 413, 118, 119); (c) a third contained a joint computation by the revenue agent of totals of assets and liabilities, resulting in figures labeled "Increase in Net Worth" (R. 217); it was placed before the jury over the defendants' objections (R. 150); the computation on this blackboard, sometimes called the

printed as such. The typewritten transcript of the testimony contains the renewal at pp. 342-343, as follows:

Mr. Garrity: That's all. Thank you.

The defendant rests, your Honor.

The Court: Any rebuttal?

Mr. Miller: I think not, your Honor.

Mr. Garrity: I would like to renew my motion for acquittal filed with your Honor.

The Court: I will discharge the Jury until ten o'clock tomorrow morning. You may go now.

(The Jury leaves the Courtroom at 3:45 P.M.)

The Court: I will hear you now.

agent's net worth statement or computation (R. 150, 172, 174), was referred to many times during the agent's testimony (R. 152, 153, 154, 162). None of the blackboards contained the figures used in the net worth statement signed by the petitioner.

The charge to the jury put the question of how the net worth statement signed by the petitioner was obtained from him (R. 210). As framed by the judge, the question was not as to the understanding of the petitioner's accountant Delaney, but rather whether or not trickery, fraud or deceit was practised upon Delaney to obtain the statement. If the jury should decide that question in the affirmative, it was instructed to reject all the evidence contained in the statement and all evidence obtained through it (R. 210); if the negative, to use everything in the statement and every bit of evidence in the case (R. 210, 212). Before the jury retired, the scope of this instruction was narrowed to include only evidence admitted against the petitioner (R. 214).

The jury returned verdicts of guilty on each of the four counts submitted to it (R. 215) and the judge imposed consecutive sentences of imprisonment for one year and one day on each count, and also a fine of \$5,000.00 (R. 25). The petitioner was admitted to bail pending appeal (R. 4).

The Court of Appeals for the First Circuit affirmed the judgment of the district court (R. 264). Its opinion analyzed the sufficiency of the evidence entirely on the basis of the net worth statement signed by the petitioner (Govt. Ex. 20, R. 42, 66, 123, 231-234) and without reference to the blackboard figures upon which witness Toohey, the revenue agent, computed the tax liability of the petitioner and his wife. The opinion treated Exhibit 20 as a statement of the petitioner's individual net worth and in that connection cited the wording of the jurat appearing at the foot of the said statement. It approved the admission in

evidence of Exhibit 20 for the reason that the record disclosed no evidence of coercion or compulsion of the petitioner (R. 260). It found no error in the judge's charge to the jury.

The petitioner filed a petition for rehearing (R. 265) which the Court of Appeals denied (R. 267). An order staying mandate was entered (R. 267). On June 7, 1954, this Court granted the petition herein for a writ of certiorari and ordered that the record which accompanied the petition be treated as though filed in response to such writ (R. 268).

SUMMARY OF ARGUMENT

The argument of the petitioner before this Court will be divided into four parts, as follows:

1. Corroboration of starting net worth.
2. Admissibility of the statement signed by the petitioner.
3. Failure of the Court of Appeals to consider whether the evidence other than the statement was independently sufficient to sustain the conviction.
4. The variance in the theory on which the case was tried in the district court from the theory on which the conviction was sustained in the Court of Appeals.

The arguments on the first two points will go back to the proceedings in the district court in some detail and endeavor to convince this Court that errors which originated there were perpetuated by the Court of Appeals. Reversal on these points would make appropriate an acquittal of the petitioner or a remand for a new trial. The arguments on points three and four pertain solely to the opinion of the Court of Appeals and ask this Court only to remand to that court for consideration of the arguments of the petitioner as to the sufficiency of the evidence to sustain the conviction. The petitioner does not at this time ask this

Court to search the record in order itself to answer this question and will indicate the arguments he wishes to be considered in the Court of Appeals only to the extent necessary to give the Court a basis for decision on the points raised herein.

The main defense of the petitioner at the trial and before the Court of Appeals was negative, in the nature of a demurrer to the evidence, and little attempt was made to disprove any of the evidence introduced by the Government. This position was based on the belief that the Government could not secure a conviction against the petitioner on the basis of evidence relating to another person. In a memorandum on petitioner's request for a bill of particulars, the Government early stated that the amount of alleged unreported income of each co-defendant was immaterial to the issues (R. 12-13), and at the hearing Government counsel stated that he had no evidence or proof sufficient to segregate the items of income (R. 13). No effort was made at the trial to convince the jury that assets admittedly in the name of Eva Smith were beneficially owned by the petitioner, and it was not until its brief before the Court of Appeals that the Government for the first time advanced an argument of such ownership based on the words "my true worth" on the net worth statement signed by the petitioner. Petitioner contended in the Court of Appeals not only that this approach was fundamentally unsound and was therefore a basis for reversal, but also that many other errors of a substantial nature flowed directly from it. These contentions were intentionally omitted from the petition for certiorari and will not be further developed before this Court. *Bates v. United States*, 323 U.S. 15 (1944); *Manufacturers' Finance Co. v. McKey*, 294 U.S. 442, 453-454 (1935).

1. The Court of Appeals for the Ninth Circuit in *Calderon v. United States*, 207 F2d 377 (1953) reversed a con-

viction in a net worth tax evasion case because the admissions of the defendant of his net worth at the start of the indictment period were insufficiently corroborated by independent evidence. The *Calderon* case has been brought before this Court and will have been argued before this case; this brief will not, therefore, discuss the law on this point, but will be confined to indicating that the *Calderon* law as to corroboration is applicable to the facts of this case.

The opinion below points to three items of evidence in corroboration of petitioner's starting net worth (R. 262). One, that petitioner's wife was a housewife, is just not corroborative of the point. Another, that petitioner had earned \$40.00 a week between 1941 and 1945, is itself an oral admission to a treasury agent. The third is tax returns for prior years; this evidence is extremely weak; the record does not even indicate whose returns were being talked about, and does not state the amount of income reported on the returns (R. 26-27).

Petitioner was not credited with any cash on hand either in the statement signed by him or in the Government computation. There was never any corroboration as to that specific item.

2. The Government introduced at the trial a financial statement signed by the petitioner (Gov't. Ex. 20; R. 42, 66, 123, 231-234). This statement disclosed increases in worth greater than the amount of income reported on the petitioner's tax returns and was the basis of the opinion of the Court of Appeals affirming the petitioner's conviction (R. 260-261).

The statement was delivered by the petitioner's accountant to a treasury agent along with a check for \$15,000.00 in part payment of a liability for taxes and penalties computed on the basis of the statement. This was the culmination of many discussions between the accountant and the

agent, and the accountant understood that it would terminate the criminal aspect of the case, especially since the agent knew that a check would accompany the statement. The check was accepted by the agent but was returned by him on the next day, enclosed with a letter (Def. Ex. A; R. 94, 235) stating that, as the accountant knew, checks could not be accepted where there was a possibility of criminal prosecution.

The petitioner moved to suppress this statement prior to trial on the ground that it had been obtained by fraud and trickery on the part of the Government; he renewed this argument at the trial as a reason for excluding the statement from evidence and, in addition, contended that the statement was inadmissible as a confession induced by a promise of immunity.

The trial judge refused to hold a preliminary examination in the absence of the jury on its admissibility and failed to instruct the jury on the admissibility of a confession induced by a promise. The Court of Appeals stated that the statement was properly admitted, since there was no evidence of "coercion or compulsion" (R. 260).

The rules applicable to the admissibility of confessions should be applied to this statement, because, as the opinion of the Court of Appeals makes clear, it provides in itself almost an entire case against the petitioner. If not completely a confession, it is so damaging an admission as to be entitled to the gravest consideration, cf. *Ashcraft v. Tennessee*, 327 U.S. 274, 278 (1946).

Treated as a confession it should be excluded because of its untrustworthiness. It was admittedly false, both to the benefit and to the detriment of the petitioner. Reliance on the conduct of the treasury agent as an implied promise was reasonable, and the inducement, cessation of criminal prosecution was material.

If it is not sufficiently clear that the statement should

have been excluded, there should have at least been a preliminary hearing in the absence of the jury on the question. *United States v. Carignan*, 342 U.S. 36, 38 (1951). The petitioner seasonably demanded such a hearing, but it was denied by the judge on the ground that the statement was not a confession (R. 124-126). It was clearly not treated as a mere admission by the Court of Appeals, however, in its discussion of its admissibility, and it is submitted that the court's failure to state that a hearing should have been held was in error.

3. In *Stein v. New York*, 346 U.S. 156, 179 (1953) the Court indicated that it looked with some disfavor upon a procedure similar to that utilized in the district court below in admitting the statement signed by the petitioner into evidence and then instructing the jury to reject it if fraud or deceit were found. It was pointed out that such a procedure made necessary consideration of two alternatives, one if the jury accepted the evidence and the other if it rejected. The Court then did in the *Stein* case review the two alternatives.

The Court of Appeals in the case now before the Court approved the procedure of the district judge in submitting the statement to the jury (R. 260). It did not then consider whether or not the evidence in the case was sufficient to sustain the conviction if the jury rejected the statement; it assumed only one of the two alternatives. The case must, therefore, be remanded to the Court of Appeals for its further consideration.

4. There is much in the record to show that the case was tried to the jury on the theory that the increase in assets of the petitioner and his wife, as brought out in the testimony relating to bank accounts, real estate, mink coats, stock, automobiles, etc. and as written on the blackboard before the jury, was sufficient to show that the petitioner earned income in excess of that which he reported. The con-

trast in emphasis given to the blackboard and to the statement signed by the petitioner is in itself striking. From the Government's statement in the bill of particulars that they relied "upon circumstances of increased net worth" (R. 9) to the judge's charge to the jury that the Government had set out to show "through circumstantial evidence that this crime or these crimes had been committed" (R. 211), there was never an indication that the statement of the petitioner, together with corroborating evidence, was sufficient to convict him. Certainly this was never pointed out to the jury. Indeed, the Government contended and the judge ruled that it was only an admission (R. 125-126).

Had the petitioner any inkling of the basis upon which the Court of Appeals would decide the case, the matters of objections to evidence, evidence to be offered, arguments to be made, and requests for instructions would have been influenced by different considerations. Factual issues should be formulated and determined in the trial forum and litigants should not be surprised in appellate courts by decisions on issues upon which they have offered no evidence. *Hornel v. Helvering*, 312 U.S. 552, 556 (1941). A verdict on the theory adopted by the Court of Appeals requires submission to the jury of the fact issues peculiar to that theory. *Nye & Nissen v. United States*, 336 U.S. 613, 618 (1949).

The petitioner was not convicted by the jury on the basis of the statement signed by him and other admissions; if anyone can ever be certain about what goes on in the minds of twelve people, he was convicted in the minds of the jury by the circumstantial evidence recorded on the blackboards before their very eyes. The petitioner is entitled to a review of the evidence on which he was convicted and against which he defended, not to a review of evidence which *might*, had the case been tried differently, have been sufficient for the conviction.

ARGUMENT

I. THE STARTING NET WORTH WAS NOT SUFFICIENTLY CORROBORATED BY INDEPENDENT EVIDENCE.

In *Calderon v. United States*, 207 F.2d 377 (9 Cir. 1953) a conviction for income tax evasion on the net worth theory was reversed by the Court of Appeals because of a lack of independent corroboration of the defendant's starting net worth as stated in his written and verbal admissions. The *Calderon* case was relied upon by the petitioner in his brief before the Court of Appeals and was cited by the Court in its opinion (R. 261). However, its opinion did not interpret that decision to require specific corroboration of the element of cash on hand in the starting position, or even of the starting position as a whole, but rather looked for and recited general corroboration of petitioner's oral and written admissions.

Because the *Calderon* case is before this Court and will have been argued prior to the oral argument of this case, this brief will not discuss the law on the point, but will only call the Court's attention to certain facts and point out the applicability of that decision to such facts. If, then, this Court approves the law set forth in the opinion of the Court of Appeals for the Ninth Circuit, it is submitted that the opinion below in the case at bar is in error.

Six numbered points are set out in the opinion of the Court of Appeals as corroborating evidence of the written and verbal statements of the petitioner (R. 262-263). Of these, only the second point is related by the opinion to corroboration of the net worth of the petitioner on December 31, 1945, the starting position (R. 262). The evidence cited in that point consists of testimony regarding previous tax returns, an oral admission by the petitioner about his

salary between 1941 and 1945, and testimony that his wife was a housewife from 1943 to 1950.

The brother of petitioner's wife, witness George, testified that she was a housewife from 1943 to 1950, and that she had no other occupation during that period except that she owned a building which the witness handled for her (R. 51). This evidence does not corroborate petitioner's statements as to his starting net worth in any particular.

Witness McMahon, a treasury agent, testified that at a conference late in April of 1951 (R. 60), petitioner stated to him that he had worked in a package store for about \$40.00 weekly from 1941 to 1945 (R. 63). This, being itself an oral admission, cannot be corroboration of such admissions.

Finally, a witness from the office of the Director of Internal Revenue identified the joint tax returns of Daniel and Eva Smith for the years 1946 through 1950, and a photostat of the 1945 joint return (R. 26). (Returns for the years 1946 to 1949 are Govt. Exs. 1 to 4, R. 225-230). Following that portion of his testimony, he testified that no returns for the years 1936 through 1939 could be found; that non-taxable returns were filed for the years 1940 and 1942, a non-assessable return for 1943, a refundable return for 1944, and a taxable return for 1941 (R. 26-27). The record does not disclose the amount of income reported on any of these returns nor, except for the non-taxable returns, the amount of tax paid in any year. The record before this Court and before the Court of Appeals also does not disclose whether the returns were joint or the individual returns of either Daniel Smith or Eva Smith, the co-defendant.⁷ Since so little information is disclosed by this tax return testimony, it seems entirely inadequate to support

⁷ Reference to Page 25 of the transcript of testimony, from which the record was designated, discloses the following testimony immedi-

the starting net worth position. This is true especially as it is the only evidence tending so to corroborate.

In two respects, moreover, the position of the petitioner is stronger than that of the defendant in *Calderon*. First, no cash on hand was credited to petitioner either in the statement signed by him nor in the Government's computation (R. 151, 217), although petitioner had mentioned to a treasury agent receipt of cash payments in previous years (R. 102). Second, in the statement signed by the petitioner (R. 231) a total increase in net worth of \$11,213.48 is computed for the year 1946. However, of this increase, \$9,600.00 is represented by the supposed acquisition of the residence at 16 St. James Road, Shrewsbury. In fact this property was acquired in 1943 (Def. Ex. P; R. 178, 244) and was properly included in the government's computation of net worth as of December 31, 1945 (R. 217). If this mistaken \$9,600.00 increase is eliminated from the net worth statement signed by the petitioner, the total admitted increase in net worth for 1946 is \$1613.48. The petitioner paid a tax for the year 1946 on a net income of \$3,777.66. Therefore, it can be said that the government's evidence, far from corroborating petitioner's written statement, disproved his admission of tax evasion for the year 1946, the charge alleged in the first count of the indictment.

ately preceding the quoted portion of the witness' testimony in the record.

Q. Now, Mr. Witness, was a search made for the tax returns of the defendant, Daniel L. Smith, for the years prior to 1946, at your office? A. Yes.

Q. Just Yes or No. A. Yes.

Q. Yes.

The witness was never asked, and never testified, concerning any of the tax returns of Eva Smith prior to 1945. In view of the fact that it later turned out that Eva owned most of the assets, it is felt that this omission from the designated record is harmful, if anything, to the petitioner. In any event only the official record was before the Court of Appeals.

II. THE FINANCIAL STATEMENT SIGNED BY THE PETITIONER WAS IMPROPERLY ADMITTED INTO EVIDENCE.

The facts leading up to and surrounding the submission of the financial statement submitted by petitioner's accountant to the treasury agent have already been stated in detail. To summarize briefly at this point, the accountant and the treasury agent both knew that a check in part payment of the liability computed on the basis of the statement would accompany it and that such a check would not be accepted if the possibility of criminal prosecution remained open; the check was accepted by the treasury agent and returned the next day.

The net worth statement signed by the petitioner was admitted in evidence in the trial court without a preliminary hearing before the judge in the absence of the jury, in spite of petitioner's request therefor, on the ground that it was not a confession but merely an admission. (R. 123-126). Also, the judge charged the jury that the statement should be rejected only if fraud or deceit had been practiced on petitioner or his accountant, and that their state of mind when submitting the statement was immaterial. (R. 210). The jury was instructed primarily on circumstantial evidence and the case was submitted to it on that basis. (R. 209, 211). The Court of Appeals affirmed the conviction without any discussion of a confession induced by a promise. It mentioned only coercion or compulsion (R. 260), objections never raised by the petitioner at any time.

There was error in the District Court both in the manner and the fact of the admission in evidence of the statement, error compounded in Court of Appeals by its omission in the opinion to consider the law relating to the admission in evidence of a confession induced by a promise.

The error in the trial judge's treatment of the statement

was apparently predicated upon his acceptance of the Government's contention that the statement was an admission and not a confession (R. 125-126). This could not, however, have been the rationale of the Court of Appeals, as the two cases cited in the part of the opinion discussing the admissibility of the statement, *Wilson v. United States*, 162 U.S. 613 (1896) and *Williams v. United States*, 189 F2d 693 (1951), deal unmistakably with the law of confessions. Further, all the elements of the crime charged were deemed by the Court of Appeals to have been contained in the statement, which was considered to have been sufficiently corroborated.

In any event, this Court has made no distinction between admissions and confessions in this regard. In *Bram v. United States*, 168 U.S. 532 (1897), *Wilson v. United States*, 162 U.S. 613 (1896), and *Lisbena v. California*, 314 U.S. 219 (1941) the statements of the defendants were all accompanied by express denials of guilt. In *Ashcraft v. Tennessee*, 327 U.S. 274, 278 (1946) this Court expressly stated that the limitations imposed on the states by the Fourteenth Amendment apply to admissions as well as confessions. Professor Wigmore characterizes a confession as one form of admission and would limit the law on admissibility of confessions to those admissions "which directly touch the fact of guilt." III Wigmore on Evidence (3rd ed., 1940) § 821 (3). Whether regarded as a confession or as an admission, the statement was a document of an incriminating nature and was submitted under circumstances showing clearly that it was designed as a vehicle to secure criminal immunity and a civil settlement. It should, therefore, be considered as a confession in any discussion of its admissibility.⁸

⁸ The Government contended in its Brief in Opposition to the Petition for Certiorari, as it had in the Court of Appeals, that the statement was exculpatory and, therefore, not a confession (Brief in

As far as can be determined, this Court has not decided any case in which a defendant has contended that a confession was inadmissible because obtained by a promise of immunity. However, dicta in several cases recognize the traditional rule, e.g. *Sparf and Hansen v. United States*, 156 U.S. 51, 55 (1895) ("hope of reward"); *Wilson v. United States*, 162 U.S. 613, 622 (1896) ("any threat, promise, or encouragement of any hope or fear"); *Bram v. United States*, 168 U.S. 532, 542-543 (1897) ("any direct or implied promises"); *Wan v. United States*, 266 U.S. 1, 14 (1924) ("induced by a promise or a threat").

Admissibility in the Federal Courts is governed by "principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience". Fed. Rules Crim. Proc., 26. The common law definitely recognizes the inadmissibility of confessions induced by such promises. III Wigmore on Evidence (3rd., ed., 1940) § 836 (1).

In the light of the fact that the petitioner had never suggested any coercion or compulsion in the procurement of the statement, and in view of the contentions that were made, it is surprising to find the Court of Appeals discussing the admissibility of the statement in the following language:

"The appellant contends that the district court erred in admitting this statement and in failing to submit to the jury the question of the voluntariness of the state-

Opposition 12-13). This contention relies on the facts that the tax plus fraud penalty had been computed to be some \$28,000, and the check submitted with the statement was for \$15,000. This, however, overlooks the fact that the check was intended and understood to be only a part payment, a fact clearly stated in the letter returning the check (Def. Ex. A; R. 94, 235). Also, as pointed out to the Court of Appeals, the nature of the civil fraud penalized by I. R. C. § 293 (b), 26 U. S. C. § 293 (b), is identical to that proscribed by section 145 (b).

ment. We find no merit in these contentions. There is no evidence that the appellant was in any way coerced or compelled to submit the statement. The statement, therefore, was properly admitted in evidence. *Wilson v. United States*, 162 U.S. 613 (1896). And since there was a complete absence of evidence of coercion or compulsion, no factual question on this issue was presented for the jury to determine. *Williams v. United States*, 189 F.2d 693 (1951)." (R. 260)

The Court of Appeals here states and apparently applies good law to facts which do not exist; it totally ignores the law which is applicable.⁹

The principle of the exclusion of a confession induced by fear or promise is the untrustworthiness of the testimony contained therein. III Wigmore on Evidence (3rd ed., 1940) § 822; *Lisbena v. California*, 314 U.S. 219, 236 (1941). The statement signed by the petitioner was concededly untrustworthy; not only does it not disclose a bank account owned by the petitioner, it also contains errors to his detriment. For example, the residence at 16 St. James Road, Shrewsbury, listed in Exhibit 20 as having been acquired in 1946 at a value of \$9600.00, was shown at the trial to have been acquired in 1943 (Def. Ex. P; R. 178, 244), and was included in the Government's figures at the start of the prosecution period (R. 217). Moreover, the circumstances surrounding the delivery of the statement and the check show that the petitioner and his accountant believed that a very real threat of criminal prosecution could be avoided by a substantial payment. Also the possibility of criminal prosecution for tax evasion, even to an innocent

⁹ There are, of course, different bases for the exclusion of confessions. See, e.g., *McNabb v. United States* 318 U.S. 332 (1943); *Lisbena v. California*, 314 U.S. 219, 236 (1941). Petitioner, however, relies only upon the common law.

man, with the likelihood of an expensive and time-consuming trial and the inevitable notoriety, is something to be avoided at almost any cost.

It is submitted that the financial statement signed by the petitioner should have been excluded by the trial court, and that this Court should remand with directions that it should be excluded. Even more fundamental and apparent, however, is the error in failing to grant the petitioner a preliminary hearing in the absence of the jury at which he could, if he desired, himself testify.

The trial judge admitted the statement into evidence at the end of the second day of trial (R. 123-124). At his first opportunity, on the morning of the third day, counsel for the petitioner on the record requested the judge to hold a preliminary hearing in the absence of the jury on the admissibility of the statement (R. 124-125). Remarks of counsel both for the petitioner and for the Government at that time indicate that prior conversations had been held with the judge and that he had ruled that it was not a confession (R. 125). Although nothing was said about the petitioner himself testifying, the emphasis being put on Delaney, the petitioner's accountant, concomitant with the right to such a hearing in the federal courts is the right of the defendant to testify. *United States v. Carignan*, 342 U.S. 36, 38 (1951). In this case, since the judge refused even to hear the accountant before ruling finally on the admissibility of the statement, it does not appear whether counsel contemplated the testimony of the petitioner himself. Indeed it is quite possible that such a decision had not been made at that time and that the development of the evidence would make the final decision.

The law in this area is not new; there are no novel questions involved; and it is only surprising that the Court of Appeals gave the contentions of the petitioner so little consideration in its opinion. Basically, the problem con-

cerns the nature of the statement and the nature of the inducement---if, as the petitioner contends, the statement directly touches the fact of the petitioner's guilt and if he and his accountant had reasonable ground to feel that the petitioner was obtaining criminal immunity from tax evasion prosecution, then he is entitled in the federal courts at least to a preliminary hearing on admissibility at which he may, if in his best judgment he feels he should, testify in his own behalf in the absence of the jury. If, on such a preliminary hearing, he is able to satisfy a trial judge of the facts indicated herein, to establish that he submitted his net worth statement disclosing increases greater than accounted for by his reported income because he justifiably believed that he was thereby assuring that the criminal prosecution would be dropped, then he is entitled to have the statement excluded from evidence at the trial.

III. THE PETITIONER IS ENTITLED TO A REVIEW OF THE OTHER EVIDENCE IN THE CASE.

The case was tried and submitted to the jury as one based on circumstantial evidence. As the judge said in his charge, "The Government has set out to show you through circumstantial evidence that this crime or these crimes have been committed." (R. 211) The bulk of the evidence introduced by the Government related to asset acquisition and expenditures, and very little pertained to the contents of the financial statement signed by the petitioner.

In the charge the judge instructed the jury that it should reject the statement and all evidence obtained through it, if it had been obtained through the practice of fraud, trickery or deceit upon the petitioner or his accountant. In the light of this instruction, the jury may well have rejected the statement and convicted.

In the Court of Appeals, however, the net worth state-

ment signed by the petitioner advanced to the center of the stage and almost singlehandedly carried the opinion to the affirmance of the conviction. The opinion recounts that much evidence of assets was introduced at the trial (R. 258). But in that part of the opinion which really affirms the conviction (R. 261-263), the only asset mentioned is the petitioner's bank account in the Mechanics National Bank (R. 62). The Court of Appeals did not review the circumstantial evidence to determine its adequacy to sustain the conviction.

Parenthetically, the jury could have not determined that any substantial evidence was obtained through the net worth statement signed by the petitioner. All of the evidence of assets and expenditures in the case, with one or two minor exceptions,¹⁰ came from testimony of witnesses.

The circumstances of the admission of the net worth statement and its conditional submission to the jury raises the procedural point which was decided by this Court in *Stein v. New York*, 346 U.S. 156 (1953). That point is the necessity of consideration by an appellate court of the alternative hypotheses of acceptance or rejection by the jury of the evidence conditionally admitted. It arose in the *Stein* case because under New York law the decision as to the admissibility of a confession is initially for the judge; if he decides that it is admissible, he must submit the same question of admissibility to the jury under proper instructions. The defendants had confessed and the issue of the admissibility of their confessions was decided first by the judge and then referred to the jury for its decision. The jury returned verdicts of guilty.

¹⁰ In his summation testimony, Revenue Agent Toohey used the living expense figures found in Exhibit 20 (R. 157, 233). Toohey testified that he got furniture and automobile figures from the statement (R. 162-163). However, the automobile figures differed from that given by a witness (R. 107), and he later testified that the furniture figure came from an oral admission of the taxpayer (R. 169-170).

Among the contentions of the petitioners in the *Stein* case were first, that the confessions had been coerced from them in violation of their constitutional rights; and second, that the jury should have been instructed that the defendants must be acquitted if the confessions were found by the jury to have been coerced. It appears not to have been disputed that there was sufficient evidence entirely apart from the confessions on which the verdicts could be sustained. The Court could have decided the case merely by ruling that the jury could have found on the evidence that the confessions had not been coerced and were sufficiently corroborated to furnish sound bases for convictions. And it did so rule. However, upon examination of the procedural situation, the Court determined that it must not only rule on the issue of coercion on the hypothesis that the jury accepted the confessions, but that it must also rule on the issue raised by the hypothesis that the jury rejected the confessions.

This latter issue was raised by a request that the jury be instructed to acquit if it found the confessions to have been coerced. If there had been insufficient other evidence to sustain the convictions, this instruction would obviously have been proper. The Court, however, seems to have assumed that the request was based on the fact that there was sufficient evidence apart from the confessions and that it was designed to raise the constitutional point suggested by dicta in *Malinski v. New York*, 324 U.S. 401 (1945) and other cases.

The importance of the *Stein* decision to this case does not turn on the fact that the alternative issue was raised by a request for an instruction; it is based upon the fact that, although the Court considered it improbable, it felt forced to recognize that the jury might have rejected the confessions and convicted on the other ample evidence. In the case at bar, also, the jury may have rejected the

confession and convicted on the other evidence; indeed, considering the evidence at the trial, it is extremely probable that they did convict on the other evidence.

The opinion in the *Stein* case discusses the difficult problems which are raised by the procedure used in New York and by the district court below and suggests not only the Court's disapproval of the practice but also that the federal rule is otherwise. *Stein v. New York*, 346 U.S. at 179. But see III Wigmore on Evidence, 1953 Pocket Supplement § 861, fn. 3. As long as the procedure is used, the problems will arise and it will be necessary to consider the alternatives left open by a general verdict of guilty under such instructions of a trial judge.

IV. AT THE TRIAL, THE PROSECUTION DID NOT ADVANCE AND THE PETITIONER DID NOT DEFEND AGAINST THE THEORY OF THE PETITIONER'S GUILT ADOPTED BY THE COURT OF APPEALS.

The theory of the Government's case at the trial was that the joint net worth of the petitioner and his wife was greater at the end than at the beginning of each year in issue. At the conclusion of the Government's case, a revenue agent computed net worth increases for each year in issue and tax liabilities predicated upon such net worth increases without allocating the actual ownership of the various assets between the petitioner and his wife, a co-defendant. The language of the two previous sentences is taken almost verbatim from the second and third paragraphs of the opinion of the Court of Appeals (R. 258-259). In affirming the conviction, the appellate court found it unnecessary to consider the joint net worth of the petitioner and his wife as of any date. It did, on the other hand, charge the petitioner with the actual ownership of every asset described either generally or specifically in its opinion.

In reaching this conclusion, it relied almost exclusively on a written statement signed by the petitioner (Gov't Ex. 20, R. 42, 66, 123, 231-234) which it ruled to have been sufficiently corroborated to support the convictions in the District Court. Government's Exhibit 20 consisted of five typewritten pages bound together and each headed by the words "Daniel and Eva Smith." On the page containing a net worth statement, the petitioner signed and took oath to a sentence describing the compilation as a representation of "my true worth." The net worth statement generally and the phrase "my true worth" in particular formed the keystone of the affirmance by the Court of Appeals.

At the trial, as pointed out in the judge's charge, (R. 211) the Government endeavored to show through circumstantial evidence that the crime had been committed. This was in keeping with its bill of particulars, which stated that it would rely upon circumstances of increased net worth and expenditures (R. 9). At a hearing on the adequacy of the particulars, several months prior to trial, the prosecuting attorney said he had no evidence or proof as to which of the co-defendants had earned the allegedly unreported income. Defense counsel contended vigorously that each defendant was entitled to be treated separately and not as part of a taxable entity. The prosecution differed in its interpretation of the law and persisted in mingling the assets of the co-defendants, paying no attention to the actual ownership of the assets as between the co-defendants and computing asset and liability increases and decreases jointly. The propriety of this procedure was debated at some length (R. 138-150) as a foundation for defense objections to the joint computation of net worth increases presented by the revenue agent who summarized the evidence.

Precisely what was the prosecution theory at the trial?

Apparently that the joint net worth of the petitioner and his wife increased from year to year, that their joint net worth at the start was established by Exhibit 20 and that, whenever one of the couple acted, he or she acted as the agent for the other and with the full knowledge of the other. The many respects in which the prosecution fell far short of sustaining such a theory at the trial constituted the principal subject of the petitioner's brief before the Court of Appeals.

The net worth statement signed by the petitioner was used by the prosecution only during the testimony of the final witness, Agent Toohey, and chiefly in comparing the totals shown in the exhibit with the much larger totals on the blackboard. The net worth statement signed by the petitioner was never read to or circulated among the jury. The revenue agent had made a computation of the tax liability supported by Exhibit 20 prior to trial (R. 179-180), but it was never submitted to the jury for its consideration. The sentence containing the words "my true worth" was never read nor even alluded to at any time by prosecution, defense or judge.¹¹ If the prosecution considered the crucial words to mean that the assets listed in Exhibit 20 were owned beneficially by the petitioner, it is reasonable to expect that some claim to that effect would have been made by the prosecution at some stage of the proceedings in the District Court. But none ever was.

The opinion of the Court of Appeals refers to the contention of the petitioner that no significance was given to the phrase "my true worth" at the trial and that it was "unfair" for the Government to rely upon the phrase on

¹¹ In this Court, the petitioner must rely only on the silence of the record in support of these statements. In connection with the petition for rehearing in the Court of Appeals, supporting affidavits were filed.

the appeal.¹² The contention is disposed of by the court by pointing out that the petitioner had "ample opportunity to reveal the immateriality of the words" (R. 260). It appears that the Court of Appeals would have had the petitioner bring out from complete obscurity a very damaging bit of testimony and call it to the attention of the judge, the jury and the prosecution. The court would compel the defendant in a criminal trial to anticipate every argument which might conceivably be brought to bear against him and to present evidence in defense of such argument regardless of whether or not the prosecution presents it at the trial.

This position of the Court of Appeals is in strong contrast to that of Mr. Justice Cardozo in *Shepard v. United States*, 290 U.S. 96, 103 (1933) in which he strongly condemns the fundamental unfairness of using testimony "in an appellate court as though admitted for a different purpose, unavowed and unsuspected."

There was absolutely no avowal by the prosecution at the trial of the use to which the phrase "my true worth" would be put either by the Government on appeal or by the Court of Appeals in its opinion. The petitioner was

¹² The first time during the entire proceedings that the words "my true worth" were referred to was in the brief filed by the Government in the Court of Appeals. It was there argued that the phrase proved ownership by the petitioner of the assets listed in the statement, that some of these assets stood in the name of Eva Smith, and that it, therefore, could be inferred that the petitioner owned all of the assets which stood in the name of Eva Smith. The Government was not here advancing the theory adopted by the Court of Appeals, but was seeking to bolster the case it had presented in the trial court by showing that all of the circumstances of increased net worth there introduced into evidence could be attributed to the petitioner.

Petitioner's reply brief stated that this use of the phrase "my true worth" was fundamentally unfair, since it had never been suggested at the trial that the phrase would support such an inference, and that evidence not pressed upon the trial judge and jury should not be pressed upon the Court of Appeals.

given no reason to suspect that this phrase would turn out to be the core of the case against him.

The issues raised by the opinion of the Court of Appeals are more comprehensive, however, than those involved in the phrase "my true worth," although the phrase is indispensable to the theory adopted in that court. It is hoped that it has been sufficiently demonstrated at this point in the brief that the theory on which the case was submitted to the jury was not the theory on which the Court of Appeals affirmed the conviction. The Court of Appeals did not affirm the verdict of guilty returned by the jury on the basis of the evidence on which the jury acted; the jury never considered the evidence before it in the frame of reference relevant to the theory of the Court of Appeals—in view of the instructions of the trial judge the jurors could not have considered the evidence in that light.

In *Harmel v. Helvering*, 312 U.S. 522, 556 (1941) the Court enunciated principles applicable to the case now before it. In the *Harmel* case the Board of Tax Appeals had reversed a determination of a tax deficiency, holding that income from a trust was not taxable to the petitioner under either § 166 or § 167 of the Internal Revenue Code, 26 U.S.C. §§ 166, 167. In the Court of Appeals the Commissioner relied primarily on neither of these sections, but upon § 22(a) of the Code, 26 U.S.C. § 22(a), as interpreted by the Court in *Helvering v. Clifford*, 309 U.S. 331 (1940), and the Court of Appeals upheld the Commissioner on that basis. The question before the Supreme Court was then whether or not the court below had been justified in relying on § 22(a).

In the course of deciding that question, the Court stated (312 U.S. at 556):

"Ordinarily an appellate court does not give consideration to issues not raised below. For our pro-

cedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence."

The Court then held, however, that it was so clear that § 22(a) applied that it would not serve the ends of justice to permit the petitioner to escape the tax and upheld the decision of the Court of Appeals. It did recognize, though, that the petitioner had not had an opportunity to present evidence before the trier of fact on the issue on which the case was decided and accordingly directed the lower court to remand the case to the Board of Tax Appeals for such an opportunity.

In the case at bar, the petitioner submits that he should be permitted to offer evidence and present arguments at a new trial on the new issues framed by the opinion of the Court of Appeals: (a) whether the petitioner owned beneficially the assets listed in the net worth statement signed by him; and (b) whether the petitioner's individual net worth increased by reason of the asset acquisitions reflected by the statement. On the issue of beneficial ownership, consider for example the evidence in the record pertaining to the brick building on Bartlett Street, Worcester: it was decided to Eva, the petitioner's wife (Def. Ex. O; R. 178, 239); a purchase money mortgage executed contemporaneously with the deed related to the petitioner only to the extent that he released his rights of curtesy (Def. Ex. O; R. 178, 243); the amount of the mortgage entered on Exhibit 20 is \$34,000, whereas the face of the mortgage indi-

icates that the loan was only \$33,000 (R. 241); the finances pertaining to the building were handled by Eva's brother (R. 44) through a commercial bank account in the name of Bartlett Street Realty Company opened by Eva and her brother (R. 39). On the basis of this evidence, a persuasive argument could have been advanced at the trial and on appeal that beneficial ownership of this building was proved to have been in Eva and not in the petitioner. But no such argument was ever made. Additional evidence might well have been offered.¹² As regards the issue whether Exhibit 20 proved that the petitioner's individual net worth increased during the years listed, an example has already been demonstrated: the increase of \$11,213.48 for 1946 is the result of a mistake to the extent of \$9,600.00.

The principles set forth in this section of the argument are not new; for example, the general law in the area has been summarized in Note, *Raising New Issues on Appeal*, 64 Harvard L. Rev. 652 (1951). The point arises most often in civil cases. Its presence in criminal cases is usually due to an attempt by the defendant to introduce a new issue. In such cases, the courts are normally lenient because of the comparative hardship on the defendant if the new issue is not heard. Where it is not the defendant, but the prosecution, who raises the new issue, the same factors should operate to restrict the raising of the new issue, or, at the least, to send the case back for a new trial. In *Pearson v. United States*, 192 F.2d 681 (6 Cir. 1951), for example, the court refused to sustain a conviction on a theory not advanced by the Government at the trial, primarily on the

¹² For instance, since 1946 there has been on file at the office of the Clerk of the City of Worcester, in Book 195, Page 490, a "Certificate of Married Woman Doing Business on Separate Account" executed by the petitioner's wife and authorizing her to do business on her separate account as the Bartlett Street Realty Company. This fact was known to the petitioner's attorney at the time of the trial, but no evidence of it was offered.

ground that the charge to the jury did not treat with that theory. In *Nye & Nissen v. United States*, 336 U.S. 613, 618 (1949) this Court agreed with the petitioner that the Court of Appeals could not sustain a conviction on a new theory where the fact issues arising out of that theory had not been submitted to the jury.

In summary, petitioner believes that this Court has well expressed what the petitioner believes to be the principle applicable to this case in *Bollenbach v. United States*, 326 U.S. 607, 614 (1946):

"In view of the government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trial in federal courts."

CONCLUSION

The judgment of the Court of Appeals should be reversed and the following orders made depending on the Court's decision of the questions discussed in this brief:

(a) that a judgment of acquittal be entered on the grounds that there was insufficient independent evidence corroborating the starting position and that the net worth statement signed by the petitioner was inadmissible in evidence.

(b) that the petitioner be granted a new trial on the grounds that an improper procedure was followed in admitting in evidence the net worth statement signed by the petitioner and that the theory upon which the Court of

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(b) that the petitioner be granted a new trial on the grounds that an improper procedure was followed in admitting in evidence the net worth statement signed by the petitioner and that the theory upon which the Court of

Appeals sustained the conviction was never tried out in the District Court.

(c) that the case be remanded to the Court of Appeals on the ground that it failed to consider the sufficiency of the circumstantial evidence.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 52

DANIEL SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER.

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INTRODUCTION.

The issues raised by the grant by this Court of the writ of certiorari require for their consideration a thorough understanding of the proceedings below, both in the trial court and in the Court of Appeals. The Government in its Brief in this Court seems to have misconceived the nature of these proceedings in some important aspects, and it is the purpose of this Reply Brief initially to clarify these misconceptions before contesting briefly the Govern-

ment's contentions on the four issues before the Court.

The petitioner readily concedes the validity of a theory of prosecution stated by the Government in its Brief (Govt. Br. 22, 56, 59): if the petitioner filed false income tax returns, wilfully and knowingly stating that the taxable income reported thereon was less than it truly was, it would not matter who owned the assets acquired with that income, nor, indeed, whether the income was his or his wife's. The petitioner cannot, however, concede the further assumption by the Government that the prosecution at the trial proved a case against the petitioner under that theory.

In his appeal to the Court of Appeals from the conviction in the District Court the petitioner argued extensively the many ways in which the prosecution had failed to prove the petitioner guilty under the theory as stated by the Government and further suggested that the basis of this failure lay in a fundamental misunderstanding by the prosecution of this theory. The evidence introduced at the trial was analyzed in detail for sufficiency, and it was argued not only that the relevant and competent evidence against the petitioner was insufficient to sustain the conviction, but also that prejudicial errors had been made by the judge in his conduct of the trial and in his charge to the jury.

The attitude of the trial judge, and of the prosecution, toward the admissibility against the petitioner of evidence of assets owned by his wife was, for example, one of the points strongly contested before the Court of Appeals. Counsel for the petitioner had asked that the testimony of the first witness on this point be limited to Eva Smith and excluded as to the petitioner, had observed that he would have the same request throughout, and suggested he wouldn't "bother to request my objection be noted each time." In response, the trial judge stated: "All right,

"I will protect your interests each time." (R. 30). The prosecution made no objection at this time. The point was not again raised on the first day of the trial; the same request was made and granted us to the first such witness on the second day (R. 106), again without objection by the prosecution. Finally, as a result of counsel's objection to the charge, the judge instructed the jury "not to consider any of the evidence that was put in against Eva but only such evidence as applied to Daniel Smith" (R. 214).

The Government directed the attention of the Court of Appeals to other portions of the Record which, it was contended, indicated that the judge had limited the evidence to Eva Smith only *de bene*, and had later admitted it against the petitioner.¹ The Court of Appeals dealt with this issue in one paragraph, stating that the judge had told the jury that such evidence might later be connected with the petitioner and adding, "the evidence we have mentioned together with all the other evidence introduced, clearly was sufficient for the jury to infer appellant's ownership of *the assets listed in his net worth statement*." (R. 263; italics added). It is submitted, especially in view of the trial court's supplementary instruction to the jury referred to above, that the Court of Appeals did not purport to rule that all of the evidence introduced at the trial was relevant and competent against the petitioner, and that no one yet knows what evidence was limited to Eva Smith.

Now, however, before this Court the Government has assumed that all of the evidence introduced in the case was admitted against the petitioner, regardless of the two rulings and the instruction of the trial court referred to above, and in spite of the inconclusive language employed by the Court of Appeals. For example, the evidence specific-

¹ This in itself raises an interesting procedural question. What happens to the right of cross-examination when evidence so excluded is later admitted?

ally objected to on the second day of the trial and limited to Eva Smith by the judge related to the purchase by Eva of a fur coat (R. 104-106). The Government has in its brief twice referred to this fur coat (Govt. Br. 13, 30) as part of the case against the petitioner. If the supplementary instruction to the jury by the trial judge (R. 214) meant anything, it meant that this evidence was not admitted against the petitioner.

Perhaps more important to an understanding of the proceedings in the District Court than the above considerations is the light that the circumstances related above shed on the conduct of the trial by the prosecution and the trial judge. No attempt was made by the prosecution to have the fur coat evidence admitted against the petitioner on the ground that he must have known about it, even though such an attempt would surely have been successful. Nor did the prosecution make any attempt to show that the petitioner had any knowledge of the acquisition by his wife of many of the other assets which she owned, assets of which he would have no reason to know. No attempt was made to show that his wife did not receive some or all of these assets as gifts from her family; indeed, the Government's investigation of Eva Smith was cursory and incomplete (R. 167-169).

Two of the four issues which the petitioner is now raising in this Court, *viz.* corroboration of the starting net worth and the admissibility of petitioner's net worth statement, were raised in the Court of Appeals, and, it is submitted, incorrectly decided in that Court. The other two contentions now being pressed by the petitioner arise out of the failure of the Court of Appeals to deal adequately with the issues therein raised by the petitioner, one of which was the admission of evidence discussed above. Petitioner has stated in the Petition for a Writ of Certiorari (Petition 12) and in his brief (Pet. Br. 17) his understanding that

the Court does not conceive it to be its function to review in detail alleged errors in the trial court which require an exhaustive search of the Record. The issues presented to this Court do not, therefore, include such questions. This does not, however, mean that the petitioner has admitted that the evidence independent of petitioner's net worth statement was sufficient, or even that much of it was competent, to sustain the conviction; this is the very question which he believes should be returned to the Court of Appeals for the determination which, so far, has not been made.

ARGUMENT

I. CORROBORATION OF PETITIONER'S STARTING NET WORTH.

At the outset the petitioner would like to reject the Government's suggestion (Govt. Br. 26) that he understates his case when he bases it on the decision in *Calderon v. United States*, 207 F.2d 377 (9 Cir. 1953) (No. 25 this term in this Court). In his brief petitioner pointed out that the Court of Appeals did not look for specific corroboration of petitioner's starting net worth but rather for corroboration of the statement as a whole (Pet. Br. 22). The Government now again demonstrates at length that the statement as a whole was corroborated in some important respects (Govt. Br. 24-31). With this contention we have no present argument.

It is basic that no increase in net worth can be proven unless the net worth at the time immediately preceding the alleged increase is established. As the Government states, it is "a point to start from in establishing the ultimate fact" (Govt. Br. 27). As such, the Court of Appeals for the Ninth Circuit held in *Calderon* that the whole case against a defendant, whose guilt of tax evasion

is sought to be established by the net worth method, falls unless this point from which to start is adequately corroborated.

The Government states that the whole problem is clouded by this "misconceived contention" (Govt. Br. 27) — the petitioner can only reiterate that he relies on the *Calderon* decision, that he has demonstrated that his position is at least as strong as Calderon's, and that he wishes the issue not to be clouded by the Government's suggestion that he should have taken a position which it then argues is untenable.

Finally, the Government has suggested that petitioner's contention that he was actually convicted by the jury on the basis of evidence independent of his admissions is inconsistent with his contention as to the lack of corroboration. (Govt. Br. 24, 28). However, petitioner's assertion that the jury reached its decision as a result of the record of the independent evidence placed on the blackboard before it has always been coupled with the contention that much of this evidence was improperly admitted, incompetent, and irrelevant. It is precisely this contention that petitioner seeks to have considered by the Court of Appeals.

II. THE ADMISSION IN EVIDENCE OF THE FINANCIAL STATEMENT SIGNED BY THE PETITIONER.

The Government's position under the second subdivision of the argument involves a misconception of the issue which was decided preliminarily by the trial judge on the petitioner's motion for the return of property and the suppression of evidence (R. 15) and subsequently framed by him for decision by the jury in his charge to the jury (R. 210). That issue was whether or not the treasury agent practised fraud in obtaining the financial statement Exhibit 20

from the petitioner and his accountant. Specifically, it was whether or not the treasury agent promised immunity from criminal prosecution while at the same time intending to prosecute. The crucial fact was the state of mind of the agent.

The pre-trial motion, filed pursuant to Rule 41 (e), Federal Rules of Criminal Procedure, asked that the financial statement signed by the petitioner be returned to him and be suppressed for use as evidence. The reason specified was that it was obtained from him in violation of his constitutional rights (R. 15). It was founded in law on the implications of *Centracchio v. Garrity*, 198 F.2d 382 (1 Cir. 1952), decided approximately five months prior to the filing of the motion in the case at bar.² In that case, the Court of Appeals affirmed the dismissal for want of equity of a taxpayer's petition prior to indictment to suppress evidence disclosed to treasury agents in reliance on the policy of the Treasury Department not to prosecute criminally taxpayers making voluntary disclosures. The Court approved as fully warranted by the testimony a finding by the district judge "that there was no evidence that at the time these disclosures were made the treasury officials did in fact contemplate any criminal prosecution of petitioner, and that therefore there was no basis for a finding that the Treasury agents intended all along to break some promise or declaration of policy, and obtained from petitioner the evidence in question by fraudulent misrepresentation of their intention in that regard." (198 F.2d at

² As noted in the opinion (198 F.2d at 385), the taxpayer was indicted for tax evasion subsequent to the filing of the pre-indictment petition. The criminal case was *United States v. Centracchio*, Crim. No. 52-47 D. C. Mass. The docket entries in that case show that a motion to suppress was filed, was heard by the same judge who heard the pre-trial motion and presided at the trial in the case at bar, and was decided by him on February 13, 1953, three days prior to his denial of the motion in the case at bar (R. 3).

385). The emphasis elsewhere on the same page of the opinion on this deficiency in the testimony seemed to imply that the ruling that the taxpayer's constitutional rights had not been violated, would have been otherwise if the testimony had shown that the treasury agents had intended to defraud the petitioner.

A motion under Rule 41 (c) does not raise the question of the general admissibility of the evidence sought to be suppressed. By its terms, it establishes a remedy only for "a person aggrieved by an unlawful search and seizure". In practice, at least in the District of Massachusetts, e. g. *U. S. v. Weisman*, 78 F. Supp. 979, constitutional rights ordained by the Fifth Amendment as well as the Fourth Amendment have been adjudicated upon motions to suppress. But there is nothing in the language of the rule or in the decisions authorizing, let alone requiring, a defendant to raise any issues except constitutional ones.

At the trial, the same issue, whether or not the agent had defrauded the petitioner through his accountant, was submitted to the jury for its determination. In his charge, the judge stated explicitly that the question was not the understanding of the petitioner's accountant (R. 210). It was precisely that question which the petitioner sought unsuccessfully to raise at the time of his objections to the admission in evidence of Exhibit 20 and his request for a preliminary hearing (R. 124-125). These objections clearly distinguished the constitutional questions raised by the motion to suppress from the issue of admissibility which hinged on the proper characterization of Exhibit 20. Was it a confession? If so, the understanding of the petitioner and his accountant and the reasonableness and basis for their understanding were the crucial facts. If not, then the understanding of the petitioner and his accountant were irrelevant, as the judge instructed the jury. Just prior to counsel's statement of objections, the judge ruled that

the financial statement was not a confession.³ This was the basis for denying the request for a preliminary hearing.⁴ It was also the basis for the judge's instruction to the jury that it should ignore the understanding of the petitioner's accountant.

The distinction between the tests for rejection of evidence on the ground of its having been obtained in violation of Constitutional rights and on the ground of its being an improperly induced confession is well established. As stated in III Wigmore on Evidence (3rd ed., 1940) § 823:

"Finally, a confession is not rejected because of any connection with the privilege against self-incrimination. The circumstances that this privilege protects against a disclosure which is compulsory, and that one of the tests for a confession is whether it is voluntary or not, have naturally led to the occasional use of both arguments at once by counsel in opposing the use of such a confession; but the Courts have properly kept the two principles distinctly apart. Thus, where a compulsory disclosure is offered, it may be admissible so far as the privilege against self-incrimination is concerned, and yet the question of its propriety as a confession may be raised. * * *

The distinction as applied to the facts of the case at bar was spelled out in the first twelve of the petitioner's requests for instructions (R. 16-18). The second request was put in the language of *Bram v. United States*, 168 U. S.

³This fact appears only indirectly in the record, in the prosecuting attorney's remarks (R. 125). But he stated the fact unequivocally. Note also the use of the past tense "argued" by defense counsel in his statement of objections (R. 124).

⁴Indeed, the prosecuting attorney would obviously have consented to such a hearing had the financial statement signed by the petitioner been characterized as a confession (R. 125).

532 and the third in the language of *Wilson v. United States*, 162 U. S. 613. However, these and other requests relating to confessions numbers 1, 4, 9 and 10 were irrelevant and immaterial in view of the judge's ruling that the financial statement signed by the petitioner was not a confession.

One of the main arguments of the petitioner urged upon the Court of Appeals was that the financial statement signed by the petitioner was a confession. The opinion of the Court seemed to treat it as a confession without designating it as such. For the first time in the case,² the Government has conceded in this Court (Govt. Br. 26) that the financial statement admitted an element of the alleged offense and at least approached a confession of guilt.

The Government's position rests on the premise that the issue of admissibility of a confession which the petitioner tried unsuccessfully to raise at the trial is identical to the issue of a violation of his constitutional rights which he raised before trial by a motion to suppress. The distinction between these issues is ignored throughout its argument, e.g., "the single assertion that there had been a promise of immunity" (Govt. Br. 39) and "petitioner had precisely the preliminary hearing he says was omitted [at the trial] on his motion to suppress." On this premise, the Government has described the petitioner's argument that he should have been granted a preliminary hearing at the trial as approaching the frivolous and resting upon a pointless request and an unsubstantial afterthought (Govt. Br. 21, 37, 44). The petitioner will prefer the Court's judgment as to the good faith and merit of his argument. The elaboration and clarification of this argument in the reply brief do not mean to raise points not already treated

²In its brief in opposition to the petition for a writ of certiorari, the Government took the position at page 12 that the financial statement "was plainly not a confession of guilt."

in the petitioner's main brief. In truth, this whole section of the reply brief is made necessary by the failure of the Government fairly to consider footnote 9 of petitioner's brief (Pet. Br. 28). By citing the *McNabb* case and the specific page of the *Lisbena* case,⁶ petitioner distinguished the independent bases for the exclusion of confessions; he then stated his reliance upon the common law only.

The petitioner's failure to testify at the hearing on the motion to suppress is irrelevant. He was in no position to give testimony that would shed light on the question of the agent's state of mind. But on a hearing on the admissibility of a confession, the state of mind of the confessor and his agent would have been the crucial questions. As to them, the petitioner might well have testified.⁷

III. THE *Stein* CASE.

In answer to the petitioner's argument based on *Stein v. U. S.* 346 U. S. 156 (1953), that the case should be returned to the Court of Appeals for consideration of the sufficiency of the independent evidence on the hypothesis that the jury rejected petitioner's net worth statement, the Government relies, first, on the failure of the petitioner to request a specific instruction to acquit upon such rejection, and, second, on more general considerations of policy and procedure.

As to the latter point the petitioner feels that it is un-

⁶The following quotation from *Lisbena v. California*, 314 U.S. 219, 236 appears at the page cited in petitioner's brief:

"The aim of the rule that a confession is inadmissible unless it is voluntarily made is to exclude false evidence . . . The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."

⁷For an example of an occasion for such testimony, the petitioner was conferring with Delaney when agent McMahon phoned Delaney and asked if the petitioner would be willing to submit a check with the financial statement (R. 189).

necessary, even presumptuous, to attempt to explore before this Court the meaning of its decision in the *Stein* case. However, petitioner would like to express his hearty concurrence with the Government's statement that "the answer, compelled by practical necessities, lies in adherence to the rule that admissibility of evidence is a question for the court, not the jury". (Govt. Br. 50). In this case, the trial judge did *not* rule upon the admissibility of the statement; he submitted it to the jury for its decision on the question of admissibility. He did *not* rule that the statement was admissible; he said that he could not rule that it was not admissible, and thereupon passed the buck to the jury.⁶ (R. 123-124.)

The conduct of the trial judge in this case points to the probable abdication by judges of their duty to rule upon the admissibility if they are to be permitted to pass that question on to the jury. As Professor Wigmore states, if the rule that admissibility is for the judge is to be accepted, this procedure is heresy. III Wigmore on Evidence (3rd ed. 1940) § 861. Superficially, it would appear that the procedure gave the defendant two chances to exclude the confession; actually as it develops it tends to deprive him of his opportunity to persuade the judge and leaves him to the jury alone. Perhaps this Court had these considerations in mind when it stated in the *Stein* case that the practice was "assumed" to be of advantage to the accused (346 U. S. at 189).

The Government has emphasized the fact that in the *Stein* case there was a specific request that the jury be instructed to acquit if it found the statement to have been coerced; it then states that the petitioner neither requested a "comparable" instruction nor asked the Court of Appeals to consider the sufficiency of the evidence apart from the admissions (Govt. Br. 45). This is called the "shortest

⁶Counsel for petitioner objected to the failure of the trial judge to make his own decision on the question of admissibility (R. 125).

answer to petitioner's novel argument" (Govt. Br. 46).

First, in response to this contention, the petitioner only points to his understanding of the *Stein* case as expressed in his brief that the opinion there recognizes the necessity of an appellate court review of both the alternatives open to the jury (Pet. Br. 32-33). Also, petitioner must reiterate that this net worth statement was, at the trial, considered only to be an admission relating to the starting point; that the trial court was requested to instruct the jury on the Government's burden of proving a fixed starting point (Request 35 and 38, R. 22, 23); and that considering the context of the trial such a specific request would obviously have been futile.

This issue as to whether or not the *Stein* question was properly preserved below is closely allied to the fourth argument of the petitioner's brief. Since his primary defense was based on the insufficiency of the independent, circumstantial evidence, and since the prosecution was relying chiefly on that very evidence in both the trial court and the Court of Appeals, the possibility that the net worth statement would prove to be, in substance, the whole case against the petitioner was just not conceivable. In that setting such a specific request now said by the Government to be indispensable was also inconceivable.

IV. THE THEORIES OF THE CASE.

The petitioner feels, again in the light of the Government brief, that it would be advisable to restate the contrast between the theory of prosecution in the trial court and the theory upon which the Court of Appeals affirmed the conviction.

The case submitted to the jury, as the trial judge so instructed (R. 209, 211), was based on circumstantial evidence. The bulk of the testimony was of assets acquired by the petitioner and by his wife. There was considerable evidence as to the delivery of the net worth statement and

the circumstances leading up to and subsequent to that delivery, but there was virtually no evidence as to its contents.

The case stated by the Court of Appeals in affirming the conviction was based on a confession, i.e. the net worth statement, supplemented by oral admissions and corroborative evidence. The contents of petitioner's statement, to which so little reference was made at the trial, were found sufficient to establish his guilt.

It is true, as the Government so strongly emphasizes, that one of the petitioner's principal objections to the prosecution's presentation at the trial was based on its failure to allocate ownership of assets, its failure to show knowledge by petitioner of his wife's acquisition of assets or of the fact of taxable income sought to be inferred therefrom. In adopting the confession theory the Court of Appeals, far from merely finding an additional fact, found it unnecessary to consider these objections of the petitioner and made deceptively simple a very complex circumstantial case. This relatively simple case was, however, never presented to the jury.

In short, the petitioner never had an opportunity to defend against the confession case fashioned for the first time by the Court of Appeals, and never received a review of the circumstantial evidence case on which he was convicted.

Respectfully submitted,

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October, 1954

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No. 50

In the Supreme Court of the United States

October Term, 1953

ROYAL S. BROWN

UNITED STATES OF AMERICA

vs.

JOHN F. BROWN

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 726

DANIEL SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST
CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 257-264) is reported at 210 F. 2d 496.

JURISDICTION

The judgment of the Court of Appeals was entered February 26, 1954 (R. 264), and a petition for rehearing was denied March 26, 1954 (R. 267). The petition for a writ of certiorari was filed April 26, 1954. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether petitioner's admission of his beginning net worth was corroborated.

2. Whether the trial court erred in admitting petitioner's sworn net worth statement without a preliminary hearing.

3. Whether, in view of the trial court's instruction that the jury should disregard petitioner's net worth admissions and evidence derived therefrom if they found that these admissions had been obtained by fraud, the Court of Appeals was required to find that there was sufficient evidence independent of the admissions to sustain the conviction.

4. Whether the Court of Appeals placed undue emphasis upon petitioner's sworn net worth statement, and if so, whether this changed the theory of the case.

STATUTE AND RULE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—

Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat

any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

Federal Rules of Criminal Procedure:

RULE 30. INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

On November 5, 1952, petitioner and his wife were jointly named in each of five counts of an indictment filed in the United States District Court for the District of Massachusetts charging them with wilful attempts to evade and defeat their income taxes for the years 1946 through 1950 by filing fraudulent returns, in violation of Section 145 (b) of the Internal Revenue Code. (R. 5-8). The amounts of net income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1946).....	\$3,777.66	\$361.00	\$33,533.42	\$13,757.63
Count II (1947).....	4,690.27	528.00	49,738.12	24,273.88
Count III (1948).....	4,849.51	422.00	58,529.48	21,442.80
Count IV (1949).....	3,319.85	198.00	67,581.10	26,286.69
Count V (1950).....	4,508.01	471.20	34,208.82	9,618.02

At the close of the Government's case the court granted a motion by the wife for a judgment of acquittal. (R. 184-185.) At the close of all the evidence the court granted petitioner's motion for judgment of acquittal as to the fifth count, but the jury, after deliberating less than an hour, found him guilty on the first four counts. (R. 207, 214-215.) On June 16, 1953, petitioner was sentenced to imprisonment for consecutive terms of a year and a day on each of the first four counts and was fined \$5,000. (R. 25.) The Court of Appeals affirmed. (R. 257-264.)

The evidence to support the verdict may be summarized as follows:

Prior to 1941 petitioner was employed by James Coan as manager of the Union News Service, which supplied racing information to bookies in Worcester. (R. 62.) During the war years the news service did not operate, and he worked in a package store at a salary of \$40 a week. (R. 63.) He managed to meet expenses during this period because he was frugal and because Coan from time to time gave him cash presents. (R. 63, 101.) His wife also worked for a short time. (R. 63.) Coan died in 1945 (R. 65), and when the need for racing information again arose in 1946 petitioner himself reopened the news service. (R. 51, 62.) He kept no records whatsoever because of the nature of the business. (R. 61.) In 1949 he ceased to operate. (R. 52.) He stated that he simply got out because it was the type of business that could not be sold. (R. 62, 130.) In December, 1949, he bought the Falmouth Bowling Club, a night club, for \$75,000, making a down payment of \$35,000 in cash and checks. (R. 48-50, 65-66, 109-111, 134.)

On October 13, 1950, Special Agent McMahon was assigned to investigate petitioner's income tax liability. Petitioner employed an accountant, Delaney, and after several discussions between the agent and the accountant a conference was held between McMahon, Delaney and petitioner on

April 30, 1951, during which petitioner answered questions about his connections with the Union News Service and the Falmouth Bowling Club. (R. 59-66.) He stated that he had received \$100 to \$250 a month from racing news customers; that some of these amounts were not reported in his returns; that no records were kept; and that he had purchased the night club with funds accumulated from his operation of the news service. (R. 50, 61, 62, 103.)

Both before and after the conference of April 30, there were numerous conversations between McMahon and Delaney concerning the preparation by Delaney of a statement showing the increases in petitioner's net worth for the years in question. (R. 71-91.) On May 24, Delaney informed McMahon that according to his figures petitioner owed \$28,000 in additional income taxes plus fraud penalties. (R. 76-77, 82-83.) On June 11, Delaney told McMahon that he would bring in a \$15,000 check when he submitted the statement. (R. 90-92.) On June 13, Delaney submitted to McMahon the net worth statement, signed and sworn to by petitioner, together with a check for \$15,000.¹ (R. 66-67, 86, 92-93.) The check was returned to Delaney the following day on the ground that criminal proceedings against petitioner were being con-

¹ The statement was headed "Daniel and Eva Smith", but only petitioner signed and swore to it as an accurate statement of "my true worth". (R. 231; Ex. 20.)

sidered. (R. 94, 235.) The net worth statement showed increases in petitioner's net worth far in excess of the taxable income he had reported for the years involved. (R. 219, 221, 225, 227, 231.) McMahon testified that at no time during his investigation had he intended to close the case upon the receipt of a payment of back taxes by petitioner, and that he had never told Delaney that the case would be closed in that manner. (R. 87-88.)

On July 17, 1951, there was a further conference between petitioner, Delaney and several Treasury representatives. Delaney stated that he would never have had petitioner sign the net worth statement if he had not been sure that the case would be closed by the submission of the check for \$15,000. McMahon told Delaney that he regretted that Delaney had gotten that impression. (R. 95-96, 128.) During the conference petitioner answered many detailed questions concerning the assets and liabilities listed in his net worth statement. (R. 131-137, 169-170.) He repeated that no records were kept for the news service. (R. 130.) He stated that no stock had been issued in the corporation formed to take over the night club, and that he kept the books and managed the business. (R. 65-66, 134-136.)

After the conference on July 17, further investigation resulted in the discovery of large bank deposits and other assets far in excess of the prior admissions of petitioner. (R. 151-153, 217-218,

221.) As fully brought out in the testimony of twenty-five witnesses for the Government, the investigation covered cash in banks (R. 27-39, 57), real estate (R. 33, 36, 37, 44-46, 65, 66, 107-111, 131, 134, 162, 163, 217, 239, 244), annuities (R. 30, 31, 36, 38, 56), furs (R. 104, 105), securities (R. 29, 32-34, 36, 37, 57, 58, 114-120), United States Government Bonds (R. 34-35), and an automobile (R. 106-107). Although many of these assets were recorded in the name of petitioner's wife, there was much evidence to indicate that he controlled them. (R. 33-37, 57-58, 110-111, 117-121.) The wife had no occupation after 1943. (R. 51.) It was determined from this investigation that for the years 1946 through 1949, petitioner should have paid \$85,764 in income taxes instead of \$1,509, and that his taxes were thus understated in the sum of \$84,255. (R. 158-159.)

Petitioner did not take the stand in his own defense. His wife, who had been acquitted at the conclusion of the Government's case (R. 184-185), did not take the stand to testify as to the ownership of the assets disclosed by the Government's investigation. Delaney testified that McMahon had told him during the course of the investigation that he would close the case when a net worth statement and a check were submitted, and Delaney said that he would not otherwise have submitted the statement. (R. 187-191.)

ARGUMENT

1. Petitioner contends (Pet. 7, 8-9) that the opinion of the court below is in conflict with *Calderon v. United States*, 207 F. 2d 377 (C. A. 9th), pending on the Government's petition for a writ of certiorari, No. 577, this Term. In that case the Court of Appeals thought the record afforded no corroboration of Calderon's extrajudicial admissions as to cash on hand at the starting point, and it held that the conviction could not be sustained in the absence of such corroboration. In the present case, on the other hand, the court below accepted the rule of the *Calderon* case (R. 261), but found that petitioner's admissions had been amply corroborated (R. 262-263). Thus, regardless of the correctness of the *Calderon* rule, petitioner's contention raises no question for review by this Court.

2. As has been noted (*supra*, pp. 7, 8), petitioner's chief defense at the trial was that the net worth statement was obtained from him on the strength of a promise that the case would be closed civilly. Petitioner now contends (Pet. 7-8, 9-11) that he was entitled to a preliminary hearing on this issue, out of the presence of the jury.

The Government first introduced the net worth statement (Ex. 20) for identification during the testimony of John J. George, petitioner's brother-in-law, who had notarized petitioner's signature.

(R. 41-42.) The exhibit was again identified by Special Agent McMahon (R. 66), and McMahon was then cross-examined at considerable length by petitioner's counsel as to the discussions between himself and Delaney which preceded the submission of the statement and the \$15,000 check by Delaney (R. 71-96). At the close of the second day of the trial, after the Government had introduced all its corroborative evidence, the trial court admitted the exhibit in evidence with a warning to the jury that they would ultimately have to determine whether, as a matter of fact, it had been obtained from petitioner by fraud. (R. 123-124.) Counsel for petitioner noted an objection, and the following morning he pointed out that he had Delaney present to testify on the issue and asked the court to withdraw the exhibit from evidence until he had heard all the pertinent testimony. (R. 124-125.) It does not clearly appear from the record whether petitioner's counsel was asking for a hearing out of the presence of the jury,² and at no time did he indicate that he desired to have petitioner testify in the absence of the jury. Ultimately Delaney testified at length on the circumstances surrounding his preparation and submission of the statement (R. 185-205) and the jury were instructed that they should disregard both the statement and all evidence obtained through it if they found

² Some of the remarks of the prosecutor indicate that he thought such a request had been made. (R. 125.)

the statement had been obtained by fraud or deceit (R. 210).

In *United States v. Carignan*, 342 U. S. 36, upon which petitioner relies (Pet. 9-10), a request was made that the *defendant himself* be permitted to testify in the absence of the jury as to the circumstances under which his confession was obtained. The request was denied, the confession was admitted, and the defendant did not thereafter take the stand. This Court, accepting the Government's concession on the point, held that the "defendant was entitled to such an opportunity to testify" out of the presence of the jury. 342 U. S., p. 38. No such circumstance is present in the case at bar. It was never suggested to the trial court that petitioner himself had any relevant evidence to offer. The defense was allowed to develop Delaney's story of the statement in full and a mere repetition of this testimony in the absence of the jury could not have had the slightest effect on the results of the trial.³

3. The jury were instructed to disregard petitioner's net worth statement and all evidence derived from it if they found it to be the product of deceit on the part of McMahon. Petitioner urges that the jury may have rejected the statement and convicted him on other evidence in the case, and that the Court of Appeals erred in not considering

³ It may also be noted that the evidence on the issue had already been fully developed, prior to trial, at the hearing on a motion to suppress the statement. (R. 2, 3, 67, 194, 202.)

the sufficiency of this independent evidence. In the case upon which petitioner relies this issue was preserved by a prayer for an instruction to the jury that they must acquit the defendants if they found their confessions to have been coerced. *Stein v. New York*, 346 U. S. 156, 188. But no such specific instruction was requested here. Petitioner asked that the jury be told to reject his statement if they found it had been obtained by trickery. (R. 16-18.) The trial court gave this instruction in substance (R. 210, 212), and he also charged adequately on the presumption of innocence and reasonable doubt (R. 208). In view of these instructions, and in view of the fact that practically all of the Government's evidence was derived from the statement and that a conviction would have been logically impossible without this derivative evidence, it must be assumed that the jury found nothing deceitful or fraudulent in McMahon's actions. *Gallegos v. Nebraska*, 342 U. S. 55, 60; cf. *Stein v. New York*, *supra*, p. 190. It was, therefore, unnecessary for the Court of Appeals to go further in its review of the evidence.

4. Finally, petitioner contends (Pet. 8, 11-14) that the theory of the case was changed in that his net worth statement was treated as an admission in the trial court and as a confession in the Court of Appeals. The argument is without merit. Petitioner's net worth statement was plainly not a confession of guilt. In fact, the circumstances of its submission indicated an ex-

culpatoary intent, for, while Delaney had estimated that the unpaid taxes plus the fraud penalty would amount to \$28,000, he eliminated the penalty entirely in submitting a check for only \$15,000. (R. 76-92, 187-189, 200-202, 205.) Nor was the statement treated as a confession by the Court of Appeals. The fact that petitioner signed and swore to the statement as a representation of "my true worth" was one circumstance to be considered by the jury along with numerous other facts (*supra*, p. 8) indicating that petitioner was the actual owner of the assets held in the name of his wife.

CONCLUSION

The decision below is correct, and no conflict of decisions or important question of law is involved. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1954.

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HAROLD S. WILLEY, Clerk

No. 52

In the Supreme Court of the United States

OCTOBER TERM, 1954

DANIEL SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATE

OPINION BELOW

The opinion of the Court of Appeals (R. 257-264) is reported at 210 F. 2d 496.

JURISDICTION

The judgment of the Court of Appeals was entered February 26, 1954 (R. 264), and a petition for rehearing was denied March 26, 1954 (R. 267). The petition for a writ of certiorari was filed April 26, 1954, and was granted on June 7, 1954 (R. 268). The jurisdiction of this Court rests upon 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner's admissions were sufficiently corroborated.

2. Whether the trial court erred in admitting petitioner's sworn net worth statement. This question is made up of two subsidiary questions:

a. Whether the statement was obtained by a false promise that petitioner would be immune from criminal prosecution.

b. Whether, after hearing evidence on a motion before trial to suppress the statement and denying the motion, the trial judge was required to interrupt the trial for a further preliminary hearing in the absence of the jury on the admissibility of the statement.

3. Whether, in view of the trial court's instruction that the jury should disregard petitioner's net worth admissions and evidence derived therefrom if they found that these admissions had been obtained by fraud, the Court of Appeals was required to find that there was sufficient evidence independent of the admissions to sustain the conviction.

4. Whether the Court of Appeals affirmed petitioner's conviction on a theory inconsistent with the one on which he was convicted.

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 51. INDIVIDUAL RETURNS.

• • • • •

(b) *Husband and Wife*.—A husband and wife may make a single return jointly. Such a return may be made even though

one of the spouses has neither gross income nor deductions. If a joint return is made the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several. No joint return may be made if either the husband or wife is a nonresident alien or if the husband and wife have different taxable years. The status of individuals as husband and wife shall be determined as of the last day of the taxable year.

* * * * *

(26 U. S. C. 1946 ed., Sec. 51.)

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

Federal Rules of Criminal Procedure:

RULE 30. INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

On November 5, 1952, the petitioner and his wife, Eva George Smith, were jointly named in each of five counts of an indictment filed in the United States District Court for the District of Massachusetts, charging them with wilful attempts to evade and defeat their income taxes for the years 1946 through 1950 by filing fraudulent returns, in violation of Section 145 (b) of the Internal Revenue Code (R. 5-8). The amounts

of their joint net income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1946)	\$3,777.66	\$361.00	\$33,533.42	\$13,757.63
Count II (1947)	4,600.27	328.00	49,738.12	24,373.88
Count III (1948)	4,849.31	422.00	58,329.48	21,442.80
Count IV (1949)	3,319.85	198.00	67,581.10	26,289.69
Count V (1950)	4,508.01	471.20	34,208.82	9,618.02

At the close of the Government's case the trial court granted a motion by petitioner's wife for a judgment of acquittal on all five counts (R. 184-185). A similar motion was also filed on behalf of the petitioner (R. 15-16). At the close of all the evidence the court granted the petitioner's motion for acquittal as to the fifth count only (R. 207). The jury found the petitioner guilty on the first four counts (R. 214-215), and on June 16, 1953, he was sentenced to imprisonment for consecutive terms of a year and a day on each of the four counts and was fined \$5,000 (R. 25). The conviction was affirmed unanimously by the Court of Appeals for the First Circuit (R. 257-264).

The theory of the prosecution was that there were increases in the net worth of petitioner and his wife for each of the years covered by the indictment considerably in excess of their reported income; that these increases represented current taxable income, derived largely from a racing

news service business opened by petitioner toward the end of 1945 (the first year in the indictment was 1946); and that the amounts of their taxable income were thus greatly in excess of the amounts reported in their joint returns. The proof supporting this theory and petitioner's conviction included (1) evidence of large net worth increases in the form of bank deposits, securities, real property, and other assets, based on documentary records and the testimony of witnesses; (2) evidence showing the source of these increases in petitioner's racing news service; and (3) petitioner's admissions that his net worth increases had far exceeded his reported income (though the increases he admitted were substantially smaller than those shown by the Government's independent evidence) and that the excess reflected unreported income on which the tax had not been paid. This evidence may be summarized as follows:

1. *The net worth increases.*—The evidence adduced at the trial, independent of petitioner's admissions,¹ showed that the joint net worth of

¹ Discounting the admissions described below (pp. 15-16), petitioner states (Br. 31): "All of the evidence of assets and expenditures in the case, with one or two minor exceptions, came from testimony of witnesses." While there is some disagreement as to whether the jury may be supposed to have considered the admissions significant (see p. 58, *infra*), it is agreed that the net worth computations summarized immediately below were in all substantial respects built from the independent evidence.

petitioner and his wife increased during the years 1946 through 1949 (the years for which petitioner was convicted) by the following amounts, which are contrasted here with the taxable income they reported for those years (R. 151-155, 217, 219-227):

	Net worth increases ¹	Reported income
1946.....	\$30,553.92	\$3,777.66
1947.....	45,877.12	4,690.27
1948.....	54,869.48	4,849.51
1949.....	65,389.23	3,319.85

¹ In the figures from which these totals are derived, an item of \$3,750 for United States Government bonds is shown twice, apparently erroneously, among the assets listed for 1946 (R. 217-18). Correction of this error, which has been immaterial throughout these proceedings, would decrease by \$3,750 the net worth increase shown for 1946 and raise by the same amount the net worth increase shown for 1947.

These increases were in addition to the personal living expenses (nondeductible for tax purposes) of petitioner and his wife, an amount he had admitted to be \$3,000 yearly for 1946 and 1947 and \$4,000 for 1948 and 1949 (R. 157, 233).² While the sufficiency of the proof of the assets comprising the net worth computations is not disputed (cf. note 1, p. 6, *supra*), the major items bear significantly on the issues before the Court. Accordingly, we summarize these items here.

² On the basis of the net worth increases plus living expenses, revenue agents determined that for the years 1946 through 1949, petitioner and his wife should have paid \$85,764 in income taxes rather than the \$1,509 they paid, so that the taxes were underpaid to the extent of \$84,255 (R. 158-159).

A. CASH IN BANKS

Between them, petitioner and his wife had fourteen accounts in twelve banks, nine of which were opened during the years 1946 through 1948 (R. 27-39, 57). One of these had been opened by petitioner in 1935 in the name of "Dean Muir" together with his sister, who testified that she was a depositor in name only, with no interest in the account (R. 36-38). The other thirteen accounts were in the name of petitioner's wife; for six of these, including five opened after her marriage, she used her maiden name, while seven were held in her married name.³ On March 6, 1946, three of the five accounts held in the name of petitioner's wife became joint, with her brother, John J. George, shown as her joint depositor; the same arrangement was employed for each of the eight accounts she opened thereafter (R. 27-36, 38-39, 57). The brother testified that he had furnished none of the funds deposited in these accounts, that he had no interest in any of them, and that he had permitted his name to be used to accommodate his sister (R. 40-41).

At the end of 1945, petitioner and his wife had \$8,058.58 deposited in their various bank accounts. By the end of 1946, the first full year in which

³ Petitioner and his wife were married in 1939 (R. 50). The single discovered bank account held by Mrs. Smith before the marriage had been opened by her in 1931. On December 31, 1939, the balance in this account was \$76.25. (R. 36, Ex. 16 (a), unprinted.)

petitioner operated the racing news business he reopened toward the end of 1945 (*infra*, p. 15), this amount had increased to \$39,238.61,⁴ and by the end of 1947 the figure was \$80,482.73. Thereafter, as other large assets were acquired (and while the total net worth continued to increase by large amounts), the total bank deposits declined to \$69,300.92 at the end of 1948 and \$42,878.72 at the end of 1949 (R. 218).

Checks drawn on at least five of the bank accounts in his wife's name were made payable to petitioner, endorsed over to him, or used to purchase assets either held in his name or of which he admitted ownership (R. 33, 34, 36, 38, 48, 57-58). In his statement purporting to show his and his wife's joint net worth (*infra*, p. 16), petitioner showed bank deposits for the years 1946 through 1949 substantially exceeding those in the one account he had opened himself though far smaller than those established at the trial (Compare R. 231 with R. 218).

B. SECURITIES

The first record of a securities purchase by either petitioner or his wife was a purchase in her name on December 8, 1947 (R. 119). In 1948, petitioner opened a separate brokerage ac-

⁴ This amount represents the sum left after deducting the \$3,750 in bonds included in the total of \$42,988.61 in bank deposits shown at R. 218. See the footnote to the table at p. 7, *supra*.

count in his own name (R. 120). The records of holdings in these accounts showed the following year-end totals, representing the cost of the securities (R. 117-121, 217):

Date	Wife's account	Petitioner's account	Total
Dec. 31, 1947.....	\$9,280.21		\$9,280.21
Dec. 31, 1948.....	37,602.57	\$1,882.96	41,485.53
Dec. 31, 1949.....	35,673.79	3,882.96	39,556.75

In the joint net worth statement petitioner signed and gave to a revenue agent in June 1951 (*infra*, pp. 15-16), he showed securities holdings substantially larger than those held in his own account, but substantially smaller than the total joint holdings proved at the trial (R. 231). Checks written in payment for securities were traced through various of the bank accounts. These checks were variously signed by the brother of petitioner's wife and by petitioner himself. They included one check for \$7,000 representing a withdrawal from petitioner's "Dean Muir" account and paid to their brokers in 1948, the amount of this payment exceeding by over \$3,000 the total of petitioner's securities holdings in his own name. Other checks, paid by the brokers to petitioner's wife, were endorsed over to petitioner or to his Falmouth Bowling Club (R. 32-33, 34, 36-37, 57-58, 120-121).

In addition to the securities held in the above-described accounts, \$30,000 was paid in 1949 for

shares in a newly organized bank issued in the name of Eva Smith. \$20,000 of this price was paid by three checks drawn on accounts in the name of petitioner's wife and her brother. The remaining \$10,000 was paid by two cashier's checks not traceable to any particular account (R. 115-117, 33-35, 36).

C. REAL ESTATE

In 1939, petitioner bought a house for \$10,500, paying an additional \$1,500 for its furnishings. He and his wife lived in this residence until 1946, when it was sold for \$10,000 (R. 45, 50, 131).

On July 8, 1943, another residence was purchased in the name of petitioner's wife, for which petitioner said he paid \$9,600 less \$1,000 returned to him to cover repairs. According to petitioner, an \$8,000 mortgage was given on this house and then paid off at a time he couldn't recall (R. 45, 132, 244-246). In 1948, this residence was repaired and improved at a cost of \$14,631.09 (R. 107-109, 122-123, 163).⁵

On May 29, 1946, petitioner purchased a brick building in Worcester, Massachusetts, in which his racing news business was conducted. The price of this property, to which title was taken in

⁵ A general contractor who had done most of this work on the house testified that he had arranged for its performance with petitioner, but had been paid by checks written by John J. George, the brother of petitioner's wife, who was a straw depositor in most of her bank accounts (R. 107-109).

his wife's name, was \$35,600, but it was mortgaged for \$33,000 or \$34,000.⁶ John J. George, the wife's brother, testified that he made the annual payments of \$1,000 on this mortgage (R. 43-44, 63, 132, 162, 239).

In December of 1949, petitioner bought the Falmouth Bowling Club, a building housing a cocktail lounge and dining room with a dance floor. Title to the property was taken in the name of petitioner's wife, who in turn leased it to the Falmouth Bowling Club, Inc., a corporation.⁷ The price was \$75,000, of which \$35,000 was paid at the time of the sale with a mortgage covering the balance (R. 49-50, 110). Petitioner later admitted that the funds for the purchase came from his racing news business and that at least some of these earnings had not been reported on his income tax returns (R. 62).

⁶ Witness George testified that the mortgage was for \$33,000 (R. 44). However, petitioner had told a revenue agent that the mortgage was for \$34,000 (R. 132).

⁷ Listed as officers of the Club were John J. George, president; Elsie G. George, treasurer; and Eva G. George (the maiden name of petitioner's wife), clerk. Though not listed as an officer, petitioner later admitted that he owned the enterprise (the corporation issued no stock), kept its books, and played an active part in its management (R. 134-135). The sellers of the property had negotiated with petitioner for the sale (R. 111).

D. OTHER ASSETS

A number of other substantial acquisitions were made by petitioner and his wife during the period covered by the indictment. The major items, traced chronologically, begin with the purchase on December 30, 1946, of United States Savings Bonds costing \$3,750, acquired in the names of petitioner's wife and her brother. The latter testified that he had furnished none of the funds for this purchase and had no interest in the bonds (R. 35, 41).

In 1947, petitioner's wife bought a Cadillac automobile for \$2,978 (R. 106-107). In the following year, petitioner bought a new Cadillac for \$4,678.70, apparently trading the prior year's model toward the purchase price (R. 163).

In 1949, a premium payment of \$37,039.64 was made for an annuity policy sold to petitioner's wife, with petitioner as beneficiary and their daughter as contingent beneficiary (R. 53-56, 30, 31, 36-38).^{*} In December of the same year, petitioner's wife acquired a mink coat and cape for which \$3,750 was paid from one of her bank accounts (R. 104, 34).

^{*} This policy had been purchased in November of 1948 and a premium payment of \$10,243.80 had been made at that time (R. 54). However, the Government's computation summarizing the net worth evidence omitted this payment and valued the policy at only \$37,039.64 (R. 217). Accordingly, we have omitted the additional \$10,000 in joint net worth which should have appeared beginning in 1948.

2. *Source of the net worth increases.*—Prior to 1941 petitioner worked for one Jim Coan as manager of the Union News Associates, an organization furnishing racing information to bookies in the area of Worcester, Massachusetts (R. 62-63). With the advent of the war, the need for this service disappeared, and petitioner worked in a package store during the years 1941 to 1945 at a salary of \$40 a week (R. 63). His wife worked for a short time during this period, apparently as a hairdresser, but from 1943 until the end of 1950 she had no occupation other than housewife (R. 51, 63, Ex. 13 (b) (unprinted)).* Petitioner told a revenue agent that because his wife worked, and because "he was not a spender," his modest income during the war years proved adequate (R. 63).

The petitioner filed no income tax returns for the years 1936 through 1939 (R. 26). He filed nontaxable returns for 1940 and 1942; a taxable return for 1941; a nonassessable return for 1943; and a return calling for a refund to him for 1944 (R. 27). The one bank account he opened him-

* In addition to the securities held in her name (*supra*, p. 10), petitioner's wife had one source of income from which she realized insignificant amounts. In 1943, she became a partner with one James A. Taylor in the operation of a drugstore (R. 112). According to the joint returns she filed with petitioner, she received \$1,112.25 from this enterprise in 1945 (Ex. 6, unprinted). For the years 1946 through 1949, the years on which petitioner was convicted, a total of \$1,786.65 was reportedly derived from this business (R. 219-228).

self, using the name Dean Muir (*supra*, p. 8), contained a balance of \$103.75 on December 31, 1939, and \$3,536.92 on December 31, 1945 (R. 36-38, Ex. 17 (unprinted)).

The pivotal event in the financial history of the Smiths occurred when petitioner began to operate the racing news service himself. In 1945, Jim Coan, former owner of the business, died (R. 65). Toward the end of that year, when the war was over, the demand for the service revived and petitioner reopened the Union News Associates as his own business (R. 51, 62). Because of the nature of the business, which he continued to operate until some time in 1949, petitioner kept no records of any kind (R. 52, 61, 130). He admitted, specifically, however, that he failed to report at least some of the income from this business (R. 62). His written admissions discussed below, while not referring directly to this business, also showed substantial amounts of unreported income. And petitioner's brother-in-law, who prepared his returns, testified that, so far as he knew, during the period in question, while petitioner was operating the racing news service, petitioner had no other occupation (R. 52-53).

3. *Petitioner's admissions.*—During the investigation of his tax returns, petitioner admitted at one point that he had had unreported income from the racing news business (R. 62). In June 1951 an accountant, Delaney, representing peti-

tioner gave to a revenue agent a statement showing what purported to be the net worth of petitioner and his wife at the end of each year from 1945 through 1949. This statement, signed only by the petitioner, in which he declared under oath that it represented *his* true worth for the period covered, showed annual net worth increases substantially exceeding the joint income petitioner and his wife had reported. It was accompanied by a check for \$15,000 in payment for taxes owing for that period¹⁰ (R. 66-67, 86, 92-93, 123, 231). It is this statement which gives rise to the issues petitioner raises (Br. 2-3) as to corroboration and admissibility.

Relating the events leading to petitioner's submission of the net worth statement, John P. McMahon, the Special Agent of the Treasury Department to whom the statement was given, testified that he was assigned to investigate petitioner's income tax liability on October 13, 1950 (R. 71). Petitioner, having been notified of the investigation (R. 58-9), retained as his representative William J. Delaney, an accountant who had been employed as a Special Agent until 1949. At a conference with McMahon on April 30, 1951, petitioner, accompanied by Delaney, answered questions about his racing news business and the Falmouth Bowling Club, stating that he kept no

¹⁰ Compare note 2, p. 7, *supra*, showing on the Government's net worth evidence tax underpayments amounting to \$84,255.

records for the news service and had failed to report some of the income derived from it (R. 59-66, 103).

Both before and after the conference of April 30, there were numerous conversations between McMahon and Delaney concerning the preparation by Delaney of a statement showing the increases in petitioner's net worth for the years in question (R. 71-91). On May 24, Delaney informed McMahon that according to his figures petitioner owed \$28,000 in additional income taxes and fraud penalties (R. 76-77, 82-83). On June 11, Delaney told McMahon that he would bring in a \$15,000 check and a net worth statement (R. 90-92). On June 13, Delaney gave McMahon the signed net worth statement and \$15,000 check (R. 66-67, 86, 92-93). The check was returned to Delaney the following day on the ground that payment of taxes could not be accepted while the possibility of criminal proceedings was being considered (R. 94, 235). On July 17, 1951, at a conference attended by petitioner, Delaney, McMahon, and two other special agents, Delaney said he would never have submitted the net worth statement had he not believed that the case would be closed on that basis (R. 95-96, 191).

Agent McMahon testified at the trial that he had never intended to close the case upon receipt of the statement and had never told Delaney any-

thing to suggest such an intention (R. 87-88).¹¹ Delaney testified that on one of his visits to McMahon's office, the latter said that, upon receipt of the statement, "he would close the case in the usual way." On cross-examination, Delaney was asked whether he knew from his experience as a Special Agent that such an agent lacked authority to close a case himself. Delaney said he had not known this (R. 203).

Except for Delaney's, the defense offered no testimony bearing on the counts of the indictment here in issue.¹² Petitioner's wife, who had been acquitted at the conclusion of the Government's case (R. 184-185), did not take the stand.

SUMMARY OF ARGUMENT

I

Petitioner's own statements showed substantial net worth increases admitted to represent unreported income. These admissions were amply corroborated.

Evidence independent of petitioner's admissions proved net worth increases and nondeductible expenditures for each year ten to twenty times as great as the taxable income petitioner and his

¹¹ The facts of petitioner's pretrial motion to suppress the statement and the procedure at the trial are recounted more fully in the pertinent portion of our argument, *infra*, pp. 35-37.

¹² Another witness, Rowe (see R. 185), testified on matters pertaining to the year 1957, for which petitioner was acquitted.

wife reported. These increases began and continued concurrently with petitioner's commencement and operation of a racing news business for which he kept no records whatsoever (and which he admitted was the source of unreported income). Much of the joint wealth accumulated during the prosecution years was kept in the name of petitioner's wife and her brother, the latter testifying that he had no real interest in or claim to the property. The wife had no source of income to account for these acquisitions. And it was shown in repeated instances that this wealth, evidently originating with petitioner, remained subject to his disposal. The overall pattern of increased wealth and concealment fully confirmed petitioner's admission of the material fact that he had failed to report taxable income.

The fact that the Government's proof showed at every point net worth and net worth increases far larger than petitioner had admitted is plainly of no help to petitioner. Nor is there merit in the claim that the corroboration was inadequate because it failed to prove independently the admission that petitioner had no substantial amount of cash on hand at the starting point of the net worth computations. In the first place, such an admission, which shows in itself no element of the *corpus delicti*, need not be corroborated by independent proof of the same specific fact. See Brief for the United States in *United States v.*

Calderon, No. 25, pp. 20-31. Secondly, however, the independent evidence here, as in *Calderon*, clearly warranted the conclusion that, as he admitted, petitioner had no significant sum in undeposited currency at the starting point.

II

Petitioner's sworn net worth statement was properly received in evidence. The trial judge heard the conflicting testimony as to whether there had been a promise of immunity both on a pre-trial motion to suppress and at the trial. His determination and the jury's verdict, affirmed by the court below, are solidly supported by the record, leaving no basis for petitioner's effort to obtain a reversal by this Court on this issue of fact.

There is no substance in the procedural argument that the trial judge should have interrupted the trial for a preliminary hearing, with the jury absent, before admitting the statement. There had been precisely such a preliminary hearing on the motion to suppress. At that hearing, the trial judge had heard the testimony of petitioner's accountant and other witnesses. All petitioner asked at the trial was that the judge should hear the accountant once again without the jury. It is enough in the circumstances that the accountant repeated his testimony before both the judge and the jury. The petitioner himself, who had not testified at the pretrial hearing and who obviously

was in no position to have direct knowledge on this issue, in no way hinted that he wished to be heard at the trial in the jury's absence. The faint suggestion that he might possibly have testified had there been a preliminary hearing is an unsubstantial afterthought. Accordingly, the decision in *United States v. Carignan*, 342 U. S. 36, is inapplicable here.

III

Petitioner did not request an instruction that the jury should acquit him if it rejected his admissions. Nor did he urge that the Court of Appeals should determine whether the evidence independent of the admissions was sufficient to support the conviction. There is thus no basis for his contention that the failure of the Court of Appeals to make such a determination constitutes reversible error.

This novel argument fails in any event because it ignores the settled rule that the evidence on appeal must be appraised on "the view most favorable to the Government." *Glasser v. United States*, 315 U. S. 60, 80. It would be inconsistent with this rule for the appellate court (1) to assume hypothetically, with no basis in the jury's general verdict, that the jury rejected the admissions and convicted on the other evidence alone, and (2) to reverse if this other evidence was insufficient to support the conviction. The assumption on appeal must be that the jury, having con-

victed, relied on all the evidence. Thus, although we think the evidence independent of petitioner's admissions would sustain the verdict, there is no reason to consider the sufficiency of only this part of the record on appeal.

While it is unnecessary to reach the problem here, we argue further that, if there had been a request for an instruction to acquit if the admissions were rejected, the request would properly have been denied. For such an instruction, making admissibility a question for the jury rather than the judge, and making a jury "ruling" that evidence was improperly admitted a basis for acquittal rather than a new trial, contemplates the discharge of defendants who should properly stand trial on competent evidence.

IV

There was no inconsistency between the theory on which petitioner was convicted and the theory on which the Court of Appeals affirmed. On the Government's theory at the trial, it did not matter whether petitioner or his wife "owned" the increased wealth they acquired over the prosecution years. It was sufficient to show that petitioner knowingly filed false joint returns with his wife, knowingly underreporting their joint income and tax liability. This theory is clearly within the wilful attempt "to evade or defeat any tax" made punishable by Section 145 (b). Accordingly, if petitioner is correct in urging that this was the

theory on which the jury convicted, since the evidence clearly sustained it, the affirmance was proper. *Nye & Nissen v. United States*, 336 U. S. 613, 618. The Court of Appeals, in finding that petitioner himself was in substantial fact the owner as well as earner of the wealth shown in the joint net worth increases, only added a factual conclusion which, though plainly warranted by the evidence, was not required to sustain the conviction. This additional finding, which was probably made by the jury and required (unnecessarily, in our view) by the trial court's instructions, is in any event no basis for the claim of "inconsistency" asserted by petitioner.

ARGUMENT

I. PETITIONER'S ADMISSIONS WERE AMPLY CORROBORATED BY INDEPENDENT EVIDENCE OF HIS GUILT

The evidence against petitioner included a statement signed by him under oath showing increases in his and his wife's joint net worth substantially exceeding their reported income during the period for which he was prosecuted and convicted. *Supra*, pp. 15-16. There was, in addition, testimony of a revenue agent that petitioner had admitted failing to report taxable income during this period (R. 62). Addressing himself primarily to the first of these items, the written net worth statement, petitioner contends (Br. 22-24) that the starting point shown on this statement

was insufficiently corroborated. He omits any discussion of the law pertinent to this contention, equating the issue here with that pending in *United States v. Calderon*, No. 25. Presumably, though petitioner does not state them, the conclusions which would follow from his argument if it were sound are (1) that the jury should not have been permitted to consider the admissions and (2) that his conviction should be reversed for insufficiency of competent evidence.

Strikingly inconsistent with this argument is petitioner's insistence elsewhere in his brief (pp. 21, 33) that his net worth statement could not conceivably have been the basis for his conviction and that the jury's verdict could only have resulted from the other evidence in the case. In this assertion—made, of course, in connection with another point—petitioner himself states the complete answer to the argument considered here. For, while we cannot agree with the speculative suggestion that the jury ignored entirely petitioner's damaging admissions, there was, as we show below (pp. 28–31, 33–34), ample independent evidence to corroborate the damaging proof contained in these admissions.

Before turning to this demonstration, however, we think some preliminary analysis of this issue may be helpful. While petitioner identifies his cause wholly with *United States v. Calderon*, the problem of the corroboration requirement is posed here in a somewhat different posture. Ex-

ploration of the differences may shed light on *Calderon* as well as this case.

1. In the *Calderon* case, the disputed admission of the defendant was a statement that he had had \$500 in cash on hand at the time serving in the Government's proof as the starting point of the net worth computations. Standing alone, that admission conceded neither an underreporting of income nor a willful attempt to evade taxes; it showed, in other words, no element of the *corpus delicti*. Accordingly, we have argued in that case that the rule requiring corroboration of a confession has no meaningful application to the admission there involved—i. e., that there was no need for independent evidence of the specific, subsidiary fact of cash on hand at the starting point.¹⁸ This is so, we believe, basically because the reason for the corroboration rule—to protect “the administration of the criminal law against errors in convictions based upon untrue confessions alone” (*Warszower v. United States*, 312 U. S. 342, 347)—is obviously not present in the case of an admission which is by itself insufficient to make out even one element of the crime. Stated otherwise, our point is that the requirement that there be independent evidence of the

¹⁸ We show further in *Calderon* that, even if the rule were otherwise, the Government would prevail on the ground that there was in fact substantial evidence that the respondent there had little cash on hand at the starting point. Brief for the United States, pp. 31-38.

corpus delicti is pointlessly expanded and distorted when, in addition to independent proof tending to establish each element of the offense, independent evidence is demanded to prove a subsidiary fact shown by an admission—thus making the admission itself usable only as cumulative, corroborative evidence.

In the instant case, however, petitioner's admissions showed more than the limited, intermediate fact of cash on hand revealed in the *Calderon* admission. Here, petitioner's signed statement admitted net worth increases plus nondeductible expenditures over the prosecution years substantially exceeding the income petitioner had reported for those years. Accompanied by a belated tender of unpaid income taxes, the statement admitted an element of the alleged offense—underreporting of taxable income and underpayment of tax.

And so petitioner in one important sense understates his case when he places it on all fours with *Calderon* and argues—incorrectly, in our view—only that there had to be independent evidence of his “starting net worth as stated in his written and verbal admissions” (Pet. Br. 22). Here, the admissions at least approached a confession of guilt.¹⁴ They acknowledged the vital

¹⁴ Indeed, Wigmore defines “confession” as including an acknowledgment “of the truth of the guilty fact charged or of some essential part of it” while excluding “acknowledgments of subordinate facts colorless with reference to actual guilt.” 3 Wigmore, *Evidence* (3d ed.), § 821, pp. 238, 239.

fact of unreported income—though not conceding, of course, that there had been a willful attempt to evade taxes.¹⁵ Thus, there is presented a situation fairly calling into issue the corroboration requirement misapplied by the court of appeals in *Calderon*.¹⁶ That issue is clearly resolved against petitioner by the mass of corroborative evidence reviewed below. Pp. 28–31, 33–34, *infra*.

What we emphasize at this juncture is that the problem is only clouded by petitioner's misconceived contention that the corroborative evidence was required to prove his "starting net worth as stated in his written and verbal admissions." The ultimate fact on which these admissions bore was not "starting net worth", but underreporting of income. The starting point was nothing more than what its description represents—a point to start from in establishing that ultimate fact. The

¹⁵ Petitioner's representative, the accountant Delaney, had estimated that the unpaid taxes plus a fraud penalty would amount to \$28,000. Petitioner's check for \$15,000 omitted entirely any penalty payment (R. 76–92, 187–189, 200–202, 205).

¹⁶ Here, as in *Calderon*, the corroborative evidence is ample beyond doubt. See pp. 28–31, 33–34, *infra*. As in our brief in that case (pp. 20–22), therefore, we omit any discussion here of whether (1) the requirement that confessions be corroborated, never enforced in a square holding by this Court, merits retention in the federal courts or (2) whether the requirement should, in any event, extend to admissions, which "are not usually subject to the same restrictions on admissibility as are confessions." *Stein v. New York*, 346 U. S. 156, 162–3, n. 5. Compare the Government's brief in *Oppen v. United States*, No. 49, this Term, pp. 23–45.

crucial aspect of petitioner's admissions was not the starting point they stated or the particular increases in net worth they showed (all of which, increases as well as starting point, were shown by the Government's proof to be larger than stated by petitioner), but their acknowledgment of the important material fact that he had understated his income and the tax due thereon.

The nature of proof in general and the rule requiring corroboration of confessions in particular are both lost from view in the suggestion that petitioner's admissions could not be considered or given weight because the subsidiary fact of starting point net worth, as it was stated in these admissions, was not corroborated by independent evidence. The jury could consider, for what it was worth, petitioner's acknowledgment that he had understated and underpaid his income taxes. On any sensible theory of the corroboration rule, it was sufficient for this purpose that there was independent evidence of this element of the *corpus delicti* (in addition, of course, to proof of a wilful attempt to evade taxes, as to which no issue is presented here).

2. As we have noted, petitioner substantially defeats his own corroboration argument when he urges elsewhere that he was convicted on the evidence independent of his admissions. Whether or not this conjecture is warranted, the independent evidence was assuredly sufficient corroboration.

By detailed evidence of bank accounts, stocks, real property, and other expenditures and acquisitions, the Government proved that the net worth increases and nondeductible expenditures of petitioner and his wife during each of the years 1946 through 1949 were ten to twenty times as great as the taxable income they reported. *Supra*, pp. 6-13. It was shown that these huge increases in discoverable evidence of affluence began with petitioner's reopening late in 1945 of a racing news information service for which he had formerly worked as a salaried employee but which he conducted from 1946 to 1949 as his own business. It was undisputed that petitioner kept no records of his receipts from this business. Cf. *Spies v. United States*, 317 U. S. 492, 500.

The evidence showed, moreover, a pattern of new wealth and concealment in petitioner's financial affairs pointing strongly to conscious tax evasion. Between them, petitioner and his wife had fourteen bank accounts, nine opened after petitioner began operating the racing news information service as his own business, in which the total deposits swelled grandly beginning in 1946. Thirteen of these accounts were in the name of petitioner's wife, six in her maiden name (though five of these six were opened long after her marriage to petitioner). In ten of the accounts, the brother of petitioner's wife was shown as joint or several owner, though he admitted that he had

no interest in the funds they contained.¹⁷ In repeated instances, funds drawn from accounts in the wife's name were shown to have been turned over to petitioner or used to purchase assets he admittedly owned. *Supra*, pp. 8-9.

Though they had owned none before 1946, petitioner and his wife made large purchases of securities after 1946, each through a separate brokerage account, the wife's being by far the larger of the two. As in the case of her bank accounts, sums paid to the wife from her brokerage accounts were proved in specific instances to have been endorsed over to petitioner. *Supra*, pp. 9-10.

The rest of the picture, summarized in our Statement need not be repeated here. It is a graphic story of huge, steady increases in wealth from 1946 through 1949, symbolized by furs and Cadillac cars, new and more expensive real property acquisitions, a sizeable annuity, and a \$35,000 cash payment in 1949 for a new drinking and dining establishment.

Taken together with petitioner's admissions of increases in net worth representing unreported taxable income during these years, this evidence made out an overwhelming showing of his guilt.

¹⁷ Similarly, petitioner's wife (using her maiden name) and her brother were shown as joint and several owners of Government bonds purchased on December 30, 1946, for \$3,750. The brother testified that he had supplied none of the consideration for this purchase and had no interest in the bonds (R. 35, 41).

The narrow point here is that the admissions and the independent evidence could reasonably, naturally, and persuasively be taken together. For the evidence apart from the admissions—if it was not alone sufficient (petitioner says the jury did find it sufficient) to warrant a verdict of guilty—at least weighed heavily toward establishing that petitioner had had unreported income. To put the matter in terms of the most severely technical version of the corroboration requirement (see the Government's brief in *Calderon*, pp. 25–26), the independent evidence reached the whole of the *corpus delicti*, including the element of unreported income to which petitioner's admissions related. The argument that there was insufficient corroboration is plainly without merit.

3. We return, finally, to petitioner's insistence that the starting point net worth shown in his own statement should have been corroborated. As we have indicated, far from proving the same starting point, the independent evidence showed a greater net worth at this point and at each subsequent point (and far greater net worth increases) than petitioner had admitted. And we think it clear that no rational version of the rule requiring corroboration of a confession or admission can be supposed to require independent proof establishing the truth of each detail of a defendant's statement used against him. The details may, as here, be inaccurate in part. The prose-

cution may have no reason or need to establish the correctness of such details; it may even, as here, undertake to prove their falsity.¹⁸ What is required at most is evidence making the admission credible and reliable in its incriminating aspect.

Consideration should be given here to one important subsidiary detail on which petitioner's admission and the Government's net worth computation were in agreement; both showed no sum of cash on hand at the starting point on December 31, 1945. We have argued in *Calderon* that the jury was free to find this fact from the admission alone, without independent proof showing the absence of any considerable amount of cash on hand. That argument applies here. But, again as in *Calderon*, we point out that if it were

¹⁸ Many illustrations could be given of instances where a statement of the defendant is used against him and is then shown to be false in part or as a whole, though it serves nevertheless to point to the defendant's guilt. For example, in *Bram v. United States*, 168 U. S. 532, it was shown that an accused, told that a witness had seen him committing murder, said, "He could not have seen me. Where was he?" This response was testified to on the theory that it contained an implicit acknowledgment of guilt, an acknowledgment that the accused had performed the crime but had not been seen. Obviously, the prosecution in such a situation would have no reason to prove the truth of the statement that the accused could not have been seen; there would probably be, on the contrary, an effort to show that the accused could have been seen and had been seen. It would make no sense to hold that such a statement required "corroboration" by independent evidence that the accused could not have been seen.

needed, there is sufficient independent evidence to corroborate the admission of this subordinate fact.

Apart from petitioner's admission, the evidence of huge increases in visible wealth during the prosecution years is itself at least some proof that petitioner and his wife had no hoard of cash prior to these years sufficient to account for the increases. The reason and common sense juries are called upon to exercise attest to the improbability of the supposition that such increases represented merely the disgorging of a fortune, derived from unknown and unexplained sources, and formerly held in the perilous form of currency. The evidence here went much further, however. As we have shown, the proof of a new business, conducted without records, commencing and continuing coincidentally with the visible net worth increases, sharply heightened the likelihood that current income, not a prior accumulation of cash, explained the new wealth. Cf. *Bell v. United States*, 185 F. 2d 302, 308 (C. A. 4), certiorari denied, 340 U. S. 930; *Gleckman v. United States*, 80 F. 2d 394, 399 (C. A. 8), certiorari denied, 297 U. S. 709. It was shown, moreover, that before 1946 petitioner had been a salaried employee, that his wife had worked as a hairdresser before 1943, and that the wife had no occupation except her responsibilities as housewife

after 1943.¹⁹ As the court below observed (R. 263), this evidence further "corroborated appellant's statements as to the source of his increased net worth." It showed that there was no apparent source for large, undeposited accumulations of cash before 1946. Together with the proof that, between 1936 and 1944, petitioner had in only one year (1941) reported income sufficient to require payment of a tax, this evidence made out a wholly convincing case confirming the admission that his large net worth increases beginning in 1946 represented the unrecorded, unreported earnings of the racing news business begun at the end of 1945.

It is immaterial, of course, that the net worth increases admitted by petitioner to represent unreported income were, though substantial, considerably smaller than those shown by the independent evidence.²⁰ The Government was not re-

¹⁹ As noted above (note 9, p. 14, *supra*), the wife had a trivial amount of income from a drugstore partnership which obviously had no material effect on the overall net worth picture.

²⁰ Petitioner, giving only a partial and misleading account of this immaterial difference (Br. 24), uses it in an attempt to support his argument that the independent proof did not corroborate, but refute, his admissions. He shows that his net worth statement included for 1946 a large item acquired in 1943; correction of this error, he says, eliminates most of the net worth increase admitted for 1946. The critical fact he omits, however, is that the independent evidence showed, not only at the end of 1946, but at the end of 1945 and every other year, large amounts of assets omitted from petitioner's

quired to prove the precise amount of unreported income. *United States v. Johnson*, 319 U. S. 503, 517. It was enough that the independent evidence, like petitioner's admissions, proved large increases in net worth and proved that these increases were from current income rather than a prior accumulation. The jury was entitled to consider both the admissions and the other evidence and to draw the inference solidly supported by the whole—that petitioner had wilfully attempted to evade taxes by false reports of his income.

II. PETITIONER'S SIGNED FINANCIAL STATEMENT WAS PROPERLY ADMITTED AND CONSIDERED BY THE JURY

Petitioner moved before trial for suppression of the signed net worth statement which was later admitted against him (R. 2, 15). The motion was heard on January 30, 1953, by Chief Judge Sweeney, who thereafter presided at the trial (R. 3). At the hearing, petitioner adduced the testimony of his accountant representative, Delaney, and three revenue agents who had dealt with Delaney, in support of his contention—renewed at the trial, in the court below, and here—that the statement had been obtained from him on a promise of immunity from criminal

statement. As thus corrected, the computations established net worth increases for every year, including 1946, much larger than those petitioner admitted.

prosecution. Neither petitioner nor his wife, who was then a defendant, testified, or sought to testify, at this hearing.²¹ The motion was denied on February 16, 1953 (R. 3).

At the trial, again contending that his signed statement was inadmissible, petitioner complained that the evidence on this issue should be heard preliminarily by Judge Sweeney outside the hearing of the jury (R. 124-125). His counsel asserted that he "was bringing in Mr. Delaney to testify on the precise point," and urged that the Judge should withdraw the statement from evidence "until such time as he has heard Mr. Delaney and has made an independent * * * decision on the question of the admissibility" (R. 125). The preliminary hearing was not granted. Delaney testified for the defense, after the statement had been admitted for the prosecution, in an effort to show that it had been improperly obtained by a promise of immunity from prosecution (R. 185-205). In admitting the statement, Judge Sweeney cautioned the jury that such evidence "obtained * * * as a result

²¹ The testimony at the hearing on the motion was not made a part of the record before the court below or this Court. It is part of the original transcript, however, to which petitioner occasionally refers (e. g., Pet. Br. 8, n. 2, 23, n. 7). We are certain, in any event, that the facts we have related concerning the motion (which, together with the facts of the hearing and ruling thereon, are reported by the printed record before this Court, pp. 2, 3, 14, 15, 133-4, 194, 202) are outside the area of possible dispute.

of promise of immunity or gain * * * is not admissible as evidence." He said he could not rule as a matter of law that such grounds of exclusion existed, but that the jury would be expected to determine this issue independently (R. 123-4). Again in his charge, he instructed the jury to consider the claim that Delaney "was promised that the case would be closed if he would get the statement." He told them that if they believed the claim—if they found that "trickery, fraud or deceit" had been practiced upon Delaney to obtain the statement—they were to "reject all of the evidence that is contained in that statement and all evidence that was obtained through it" (R. 210).

Petitioner contends here that the admission of his statement was erroneous on two grounds. First, he repeats his factual claim that the statement was improperly obtained from him through a promise that he would not be prosecuted. Petitioner errs in his persistent assertion that this question was wholly ignored by the Court of Appeals (Pet. Br. 15-16, 19, 25, 27-28); the fact is that it was duly considered and correctly resolved on conflicting testimony by the jury and both courts below. Petitioner's second argument—that he was erroneously denied a preliminary hearing by the trial judge alone on the admissibility of the statement—approaches the frivolous. Petitioner had a preliminary hearing

on his motion to suppress; and even had this not been so, since all his evidence on the point was ultimately heard by both judge and jury, there was no trace of prejudice in the procedure followed.

1. On the first of petitioner's arguments—that there was a promise of immunity—it should be said at the outset that petitioner is seriously mistaken in his repeated suggestion (Br. 15-16, 19, 25, 27-28) that this point was overlooked by the Court of Appeals. In support of his statement that the Court of Appeals "apparently applies good law to facts which do not exist" (Br. 28), petitioner quotes from that Court's opinion as follows (Br. 27-28, quoting from R. 260):

The appellant contends that the district court erred in admitting this statement and in failing to submit to the jury the question of the voluntariness of the statement. We find no merit in these contentions. There is no evidence that the appellant was in any way coerced or compelled to submit the statement. The statement, therefore, was properly admitted in evidence. *Wilson v. United States*, 162 U. S. 613 (1896). And since there was a complete absence of evidence of coercion or compulsion, no factual question on this issue was presented for the jury to determine. *Williams v. United States*, 189 F. 2d 693 (1951).

But immediately following the point at which petitioner's quotation ends, in the same paragraph, the opinion continues:

There was, however, some conflict in the evidence as to whether or not the agent secured the statement by means of fraud or deceit. The district court, however, instructed the jury that if trickery, fraud or deceit were practiced upon the appellant by the Government to obtain the net worth statement, they were to reject all the evidence contained in such statement and all evidence that was obtained through it. *Denny v. United States*, 151 F. 2d 828 (4 Cir. 1945), cert. denied, 327 U. S. 777 (1946); *Montgomery v. United States*, 203 F. 2d 887 (5 Cir. 1953).

As in the trial court's instructions (R. 123, 210), the reference to "fraud or deceit" is plainly directed to the single assertion that there had been a promise of immunity. It is clear beyond doubt that the Court of Appeals, as well as the trial court and jury, considered and rejected this argument.

What is more important, of course, is that the decision on this factual issue is firmly supported by the record. The Revenue Agent, McMahon, to whom the statement was given by petitioner's accountant, Delaney, testified that he had never promised or otherwise indicated to Delaney that petitioner's submission of a net worth statement and a check would result in a closing of the case

(R. 87-88). Delaney, who had himself been employed until 1949 as an Internal Revenue Special Agent investigating fraud cases (R. 185-6, 192), said McMahon had told him "he would close the case in the usual way" upon receipt of the signed net worth statement and check (R. 188, 197). McMahon flatly denied that he had ever "told Mr. Delaney on any date anything like that" (R. 88).

The credibility of the witnesses and the reasonable inferences to be drawn from their conflicting testimony were for the triers of fact—the jury and the judge, who denied the pretrial motion to suppress petitioner's statement and refused to rule the statement inadmissible at the trial. The record, we submit, fully sustains the result they reached. They could readily have believed the testimony of the Revenue Agent and concluded that Delaney was mistaken or untruthful when he suggested that there had been a promise of immunity. (Delaney's testimony is fairly characterized, we think, as a mere "suggestion." He said twice, using the same locution, that McMahon had promised to "close the case *in the usual way*" (R. 188, 197, emphasis added). Especially since "the usual way" would hardly include terminating the case merely on the taxpayer's unchecked submission—a fact Delaney as a former Special Agent should and may well have known (see note 22, *infra*, p. 41)—his statement

could well have been taken as indicating something significantly short of the promise McMahon flatly denied ever having conveyed in any way). Indeed, there is a large element of surface incredibility in the suggestion that a taxpayer's mere acknowledgment of some tax liability would be accepted, without further investigation, as concluding a fraud investigation and potential criminal prosecution. This suggestion, or the claim that such a result had been promised, could have been found particularly unconvincing in the circumstances of this case, where the Government's investigation later revealed net worth increases and unreported income far exceeding the amounts admitted by petitioner.²²

In short, petitioner's claim that his admission had been procured by a promise of immunity was fairly considered and properly rejected by the

²² For many years before and during Delaney's service as a special agent, it had been Treasury policy not to close investigations without criminal prosecution where there was evidence of intent to defraud. At least where an investigation had been begun prior to a taxpayer's disclosures, prospective criminal prosecutions were not abandoned unless investigation disclosed no reasonable grounds for anticipating conviction. This settled policy withheld from investigating agents authority to close an investigation already begun but not completed (as was the case here) simply on the basis of the taxpayer's offer to pay what he acknowledged to be a tax liability in default. See *Hearings before a Subcommittee of the Committee on Ways and Means, House of Representatives*, 82d Cong., 2d Sess., on *Administration of the Internal Revenue Laws* (January 22, 23, 24 and 25, 1952), pp. 140-142.

jury and both courts below. His argument that a contrary factual conclusion should have been reached presents no basis for reversal here.

2. There is even less substance in the contention that the trial judge should have held a hearing during the course of the trial, excluding the jury, to permit presentation to the judge alone of the evidence purporting to show that petitioner's admission had resulted from a promise of immunity. The short answer to this argument is that petitioner had precisely the preliminary hearing he says was omitted, on his motion to suppress the written statement in question. The hearing was conducted long before the jury was even impanelled, by the judge who later presided at the trial, and the motion was duly denied. There is not the slightest basis for the argument that the procedure should have been repeated. Cf. Rule 41 (e), F. R. Crim. P.; *Nardone v. United States*, 308 U. S. 338, 341-342.

The record thus refutes the suggestion (Pet. Br. 29), for which petitioner invokes *United States v. Carignan*, 342 U. S. 36, that the denial of a preliminary hearing during the course of the trial deprived *petitioner himself* of an opportunity to testify in the jury's absence to the circumstances in which he supplied the written net worth statement. Petitioner had such an opportunity and demonstrated that it was of no use

to him; he did not testify at the pretrial hearing on his motion to suppress.²³

Moreover, the record makes clear that petitioner had not changed his mind at the trial; the superfluous preliminary hearing he sought was not requested in order that he might himself testify outside the jury's hearing. In language too plain for doubt, petitioner's counsel asked that the judge preliminarily hear Mr. Delaney and only Mr. Delaney, before permitting the written statement to remain in evidence (R. 125). There was not the faintest suggestion that petitioner himself wished to give testimony. There was, accordingly, no problem like that in the *Carignan* case of a defendant entitled to remain silent before the jury but desiring to be heard by the judge alone on the facts surrounding admissibility of a confession or admission. And this is obvious, we emphasize, from the trial record alone, apart from the independently decisive fact that petitioner could have given such testimony, if he had had any to give, at the pretrial hearing.²⁴

²³ In the light of the testimony for both the prosecution and the defense, it is apparent that petitioner was in no position to give testimony that would have helped him on this issue. Nothing said by either Delaney or Agent McMahon suggested that the latter, with whom petitioner conferred only once before the net worth statement was submitted, had made petitioner any promise of any kind or even discussed with him the preparation of such a statement.

²⁴ Recognizing that he gave no hint of a desire to testify, petitioner says here (Br. 29) that "it does not appear whether

We recall, finally, that the testimony of the accountant, Delaney, which petitioner asked the judge to hear preliminarily, was ultimately heard by both judge and jury (R. 185-205). There is no question, then, that petitioner had full opportunity, at the trial as well as before, to develop his version of the facts leading to his written net worth statement. And there is, of course, nothing in the *Carignan* decision making it necessary or desirable that such testimony, from anyone other than the defendant, should be heard preliminarily, with the jury excluded. So the record of the trial alone shows persuasively what the fact of the pretrial hearing places beyond dispute—that petitioner's request for a preliminary hearing at the trial was pointless and was properly denied.

counsel contemplated the testimony of the petitioner himself. Indeed it is quite possible that such a decision had not been made at that time and that the development of the evidence would make the final decision." The record cuts the ground from under such speculation. Petitioner's counsel had seen fully "the development of the evidence" at the pretrial hearing and had made "the final decision" not to offer any testimony by petitioner. His comments at the trial belie the suggestion that another preliminary hearing during the trial might in some way have affected this decision. It certainly could not have affected the fact that petitioner was in no position to have knowledge pertinent and admissible on this issue. See note 23, *supra*, p. 43.

III. THE COURT OF APPEALS WAS NEITHER ASKED NOR REQUIRED TO DETERMINE WHETHER THE EVIDENCE INDEPENDENT OF PETITIONER'S ADMISSIONS WAS SUFFICIENT TO SUSTAIN THE CONVICTION

1. In *Stein v. New York*, 346 U. S. 156, this Court considered the following question (p. 188): "If the jury rejected the confessions, could it constitutionally base a conviction on other sufficient evidence?" The question was raised "by a request for instruction to the jury that if it found the confessions to have been coerced it must return a verdict of acquittal." *Ibid.* This Court had already held that neither the trial judge's admission of the confessions there involved nor a jury determination that they were voluntary (and, therefore, properly to be considered) could be held constitutionally erroneous. The Court then held that there had been no error in refusing the requested instruction, concluding that a state jury could be assumed hypothetically to have rejected a confession (and, therefore, presumably to have obeyed instructions and given it no weight) and nevertheless be constitutionally permitted to convict on other sufficient evidence.

Here, no comparable instruction was requested. Nor did petitioner call upon the Court of Appeals to consider whether the evidence apart from his admissions would support the verdict. He argues, nevertheless (Br. 30-33), invoking *Stein v. New York*, that the jury may have rejected his admissions as improperly obtained and may have

then convicted him on the other evidence. He urges that, although it was not asked to consider the sufficiency of this other evidence alone to sustain the verdict, the Court of Appeals erred in failing to do so. If it were necessary to consider the problem, we think the independent evidence upon which petitioner says the jury may have convicted would support the verdict. See pp. 28-31, 33-34, *supra*. But there is no ground for such a partial appraisal of the record.

The shortest answer to petitioner's novel argument is that no basis was laid for it in the trial court, it was not attempted in the Court of Appeals, and it ought not to be heard for the first time here. Apart from this infirmity, however, there is no merit in the proposal that jury verdicts be tested piecemeal on the unwarranted assumption that they rest upon only part of the evidence.

The decisive objection to this proposal is found in the settled principle that the jury's verdict must be sustained on appeal if there is substantial evidence, "taking the view most favorable to the Government," to support it. *Glasser v. United States*, 315 U. S. 60, 80; see also *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150; *Gorin v. United States*, 312 U. S. 19, 32; *Pierce v. United States*, 252 U. S. 239, 251-2; *Stilson v. United States*, 250 U. S. 583, 588-9. This rule leaves no room for the suggestion that an appellate court should take part of the evidence (here,

the admissions), assume *arguendo* that the jury rejected it, and then reverse the conviction if the rest of the evidence is insufficient to sustain it. For, "taking the view most favorable to the Government," the assumption must be that the jury did not reject the admissions, and the only question on appeal (the separate question discussed in Point II, *supra*) is whether the admissions were properly submitted to the jury's consideration.

When this question of admissibility, which is for the trial judge, is answered in the affirmative on appeal (as we have argued in Point II it must be in this case), there can be no justification for demanding that the appellate court go further, proceed as if the jury ruled the admissions out of consideration, and decide the sufficiency of the other evidence alone. Such a procedure would entail taking the view *least* favorable to the Government. At least in a case like the one here, where no instruction was sought that the jury should acquit if it rejected the admissions, it would lead to this startling result: The appellate court would assume that the admissions had been rejected; it would reverse if it found the other evidence inadequate to support the conviction; and it would do all this even though the jury might have (and probably had) accepted the admissions and relied upon them in reaching its verdict. As we have stressed, this last possibility, that the jury did not reject the confessions, is

the proper one to be assumed on appeal. It follows that the speculative appellate excursion petitioner demands cannot be sanctioned.

An opposite conclusion would logically entail far-reaching and wholly impossible consequences for criminal appeals. There is no reason why the same argument could not be advanced with respect to any potentially significant item of evidence, other than a confession or admission, adduced at the trial. Did the jury credit this evidence? If it did not, was the rest of the evidence sufficient to sustain the verdict? If the answer is no, on petitioner's thesis, the conviction must be reversed.

The foregoing extension of petitioner's argument involves no neglect of the admittedly special character of evidence of confessions or admissions. The extension is, we submit, necessarily and fully implicit in the argument where, as in this case, no instruction like that in *Stein v. New York* was requested. For there was in this case no offer of a test by which to judge objectively whether the jury accepted or rejected the admissions. So speculation on this question is no more or less justified than would be similar speculation regarding any other item of evidence at the trial. Our suggested analogy using evidence other than a confession or admission merely points up the fatal defect in petitioner's argument—that it urges an assumption on appeal contrary to the

one by which the sufficiency of the evidence is properly to be tested.

2. What we have said disposes, we think, of the argument in this case, where there was no requested instruction like the one in *Stein v. New York*. However, since what this Court writes is likely to reach beyond this case, we add our view that the answer to petitioner's argument ought not to rest simply on the sufficient, but unduly narrow and potentially troublesome, ground that there was no request for an instruction that the jury should acquit if it found the admissions to have been improperly obtained. We believe that had such an instruction been requested, it would properly have been denied. And we would argue none the less that there would have been no need for the appellate court, had it been asked, to determine the sufficiency of the other evidence alone to sustain the conviction. These conclusions, it is submitted, strike the most acceptable balance between the objectives of (1) protecting defendants (and others) against improperly extorted or induced confessions and admissions and (2) preventing the escape from justice of persons whose guilt is susceptible of proof by competent evidence.

The question at hand arises because in this, as in many other cases, the trial judge, after ruling the disputed admissions admissible, instructed the jury to disregard them and all evidence obtained

through them if, unlike him, they found the admissions to have been improperly obtained. Though he strenuously urged such instructions himself (R. 16-18), petitioner seems to suggest (Br. 33) that, because they permit the kind of argument he attempts, they ought perhaps to be condemned—presumably, that is, that the trial judge should alone rule on admissibility and not permit reconsideration by the jury of the factors bearing on this ruling. It is obvious, however, that in federal as well as state courts, instructions like these reflect “a traditional practice assumed on the whole to be of advantage to the defense and an additional protection to the accused.” *Stein v. New York*, *supra*, at 189. See *Wilson v. United States*, 162 U. S. 613, 624; 3 Wigmore, *Evidence* (3d ed.), p. 347, n. 3. The problem as we see it is to preserve this advantage and protection for the accused without requiring that a confession or admission, deemed admissible by a trial and appellate court, should lead to an acquittal and prevent a retrial where a jury supposedly makes a contrary “ruling,” concealed in its general verdict, on “admissibility.”

The answer, compelled by practical necessities, lies in adherence to the rule that admissibility of evidence is a question for the court, not the jury. See *McNabb v. United States*, 318 U. S. 332, 338-9, n. 5; 1 Wigmore, *Evidence* (3d ed.), § 12; 2 *id.* § 487; 9 *id.* § 2550. And it is only this question of “law,” frequently of constitutional law

giving this Court jurisdiction to review state criminal convictions, which is proper for consideration on appeal. This Court said as much in *Wilson v. United States, supra*, at 624.²⁵ Adherence to this division of responsibilities between judge and jury, while it doubtless results in calling the same mental process by two different names, has eminently sensible consequences more vital to the administration of justice than logical symmetry.

The practical judgment leading to the conclusion we have stated in technical shorthand is more clearly and persuasively expressed in terms of the possible alternatives. Where the traditional instruction indicated in this Court's *Wilson* opinion is given, an appellate court, reviewing the circumstances surrounding a confession or admission, will ordinarily order a retrial if it finds the confession or admission to have been improperly received. "This Court never has decided that reception of a confession into evidence, even if we held it to be coerced, requires an acquittal or discharge of a defendant. On the contrary, this Court has returned all such cases for retrial, which we should not have done if obtaining and

²⁵ "When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant. * * * The question here, however, is simply upon the admissibility of the statement * * *."

attempted use of a coerced confession were enough to require acquittal." *Stein v. New York*, *supra*, at 189. In such a case, the jury may or may not have agreed with the trial judge that the confession was voluntary and otherwise proper. The likelihood is that the jury did agree. Indeed, this is commonly assumed on appeal in deciding the issue of coercion or improper inducement. *Id.* at 181-2.

Suppose, however, that the jury had not agreed. And suppose it had been instructed to acquit if it rejected the confession or admission. It would presumably acquit and set the defendant free, contrary to the rule that only a retrial is warranted for error in the admission of an improperly obtained confession. And this peculiar ruling of law would be the undiscoverable basis for a general verdict of acquittal.

If such a procedure is to be sanctioned, it should be a uniform one, to be enforced by judges, who ordinarily pronounce the law, as well as juries. We submit, however, that defendants are sufficiently protected by the rule now in force. It will be a rare case, of course, where a jury rejects a really damaging confession and goes on to convict the defendant anyhow. But even in such a case, the public interest in preventing coerced confessions and the particular defendant's interest in a fair trial are adequately served where both trial and appellate judges are

persuaded that (1) the confession was properly admitted and (2) the evidence as a whole, including the confession, justifies the conviction.²⁶

This conclusion turns out, after all, to be merely one illustration of the general rule prevailing where factual issues affecting admissibility, resolved by the court, may be reconsidered by the jury in assessing the weight of the evidence. It would hopelessly complicate trials and appeals if the jury's share of this task were treated as if it were the same as the judge's—with the added fillip that a jury finding of "inadmissibility" would lead to acquittal rather than the established result of ordering a retrial. At least while the system of general verdicts in criminal trials prevails, the kind of instruction proposed and properly refused in *Stein v. New York* would place an unprecedented and unjustifiable obstacle in the way of fair determinations of defendants' guilt or innocence.

²⁶ In an important sense, our argument here does not reach the general proposition which was a main concern in *Stein v. New York*—i. e., that a conviction may be sustained on other sufficient evidence where an invalid confession was received into evidence. We are dealing primarily with the question of who decides whether the confession was erroneously received. On our argument, leaving the question of admissibility as such to trial and appellate judges, it is consistent to hold for the federal courts that an improperly admitted confession always requires reversal of the conviction. Cf. *Wilson v. United States*, *supra*; *McNabb v. United States*, 318 U. S. 332.

IV. THERE WAS NO INCONSISTENCY BETWEEN THE
THEORY ON WHICH PETITIONER WAS CONVICTED
AND THE GROUNDS OF THE AFFIRMANCE BY THE
COURT OF APPEALS

Petitioner argues, finally (Br. 33-40), that he was convicted on a theory different from that on which the Court of Appeals affirmed. He rests this contention on the fact that, while the Government deemed it unnecessary at the trial to allocate assets as between him and his wife, the Court of Appeals concluded that the net worth increases and unreported income had actually been his. The shortest answer to the argument is that, on its face, it shows only that the Court of Appeals found ample proof of a factual element above and beyond what was necessary to conviction on the prosecution's trial theory; such a supposed "inconsistency" could not possibly have harmed petitioner. Before concluding with this point, however, we show that the trial judge, who directed acquittal of petitioner's wife, gave instructions under which the jury, like the Court of Appeals, probably found in fact (though unnecessarily, in our view) that the net worth increases during the indictment years were in reality petitioner's, not his wife's, because it was his unreported income which accounted for the increases and for the unpaid taxes he wilfully attempted to evade.

1. As petitioner urges (Br. 4, 5, 20, 33-35), and as the court below agreed (R. 258-259), the

Government's proof at the trial was designed to show increases in the joint net worth of petitioner and his wife without regard to which of the two had technical title to given assets acquired during the prosecution years. The Government also undertook to show that petitioner's wife had no significant source of income during this period, that substantially all the current income of both came from petitioner's racing news business, and that the unrecorded and unreported income of this business accounted for the joint net worth increases of petitioner and his wife. Instructing the jury to determine whether petitioner had a source of the allegedly unreported income, the trial judge also told them that, in appraising the net worth computations, they should "include all the property [they found petitioner] owned, that he owned as distinguished from possibly having in his name" (R. 211-212). This instruction, it should be remembered, came after the trial judge, having complained that the Government had proved no traceable income for petitioner's wife (R. 149) and stating that no starting point had been established as to her (R. 184), had directed her acquittal.²⁷

²⁷ The propriety of this acquittal, at least questionable on the broad theory of the prosecution (p. 56, *infra*), is not in issue here, of course. We mention it only for the possible light it throws on the scope of the prosecution's theory as it was ultimately limited by developments at the trial.

It thus appears that the trial court's instructions narrowed and made more difficult the theory of the prosecution. That theory, as the Government offered it, was this: Petitioner and his wife filed joint tax returns. Each was individually liable for the whole of the tax they jointly owed. Internal Revenue Code of 1939, Section 51 (b) *supra*, pp. 2-3. If either or both knew that the return they jointly filed was false—knew that it failed to report the total income of both and sought thereby to understate their joint and several tax liability—then either or both would be guilty of a wilful attempt “to evade or defeat any tax” as defined in Section 145 (b), *supra*, p. 3. On this theory it made no difference which of the two had earned the concealed income or which became “owner” of the assets acquired with the income.²⁸

²⁸ As he mentions here (Br. 13), petitioner attacked the theory as lumping him and his wife into an “entity” whereas criminal guilt is, of course, individual. The ready answer to this argument is that while the elements of the offense in Section 145 (b) had to be established against each defendant individually, it is not necessary to such a showing that the tax for which the particular defendant is liable and which he attempts to evade be shown to have arisen from his own income. Indeed, it is clear that Section 145 (b) may be violated by one who not only did not earn the income subject to tax, but is not even liable (as both petitioner and his wife were) for payment of the tax. *United States v. Johnson*, 319 U. S. 503, 514-515.

In the instructions to which we have referred, however, (*supra*, p. 55), the trial judge made the task of the prosecution more difficult. The jury was told that to convict petitioner they must not only find that he had a source of unreported income, but that the increases proved were in substance (if not in form) increases in *his* net worth. And the Court of Appeals, while clearly recognizing that the Government had not allocated "the actual ownership of the various assets between the [petitioner] and his wife" (R. 259), concluded that the jury could have inferred that the increases shown were increases in petitioner's net worth derived from his unreported income (R. 260, 261, 263).

There can be no question that this conclusion was fully supported by the evidence, which showed that petitioner had unrecorded and unreported income while his wife had practically none, and showed petitioner's extensive use of assets ostensibly owned by his wife. The point here is that the appellate court's emphasis upon this conclusion in its opinion involved no shift in "theory," but was in fact wholly consonant with the instructions under which the jury convicted.

It is true, as petitioner insists (Br. 33-35), that the Court of Appeals' opinion highlights petitioner's own net worth statement and the other evidence showing that the unreported income and net worth increases were in reality his. But this

selection of less than all the evidence to show the firm foundation for the conviction involves no change in "theory." Petitioner's admissions, solidly corroborated (*supra*, pp. 28-31, 33-34), comprised, after all, a convincing, if incomplete, basis for upholding the jury's verdict. And there seems little need to tarry over the suggestion (Pet. Br. 35) that the petitioner's signed net worth statement—which was the subject of so much testimony at the trial (e. g., R. 66, 77-78, 89-94, 127. 155-156, 187-191, 200-202), and which figured prominently in the instructions to the jury (R. 210)—was simply ignored by the jury. It is perfectly clear that this statement, if it was less important in the whole picture before the jury than it appears to be in the opinion below, was a significant item of evidence which the jury could hardly have overlooked.

In short, the Court of Appeals affirmed petitioner's conviction on a view of the evidence substantially no different from that the jury must have had in the light of the instructions by which it was guided. Petitioner's argument amounts in the final analysis only to speculation about whether the various items of evidence were identically weighed by both the jury and the appellate court. The speculation is fruitless. Assuming petitioner is right in supposing that his admissions were less important to the jury than they were to the Court of Appeals, this difference in

emphasis is no basis for arguing that there was any such shift in legal theory as could cast doubt on the propriety of the affirmance of his conviction.

2. Petitioner's argument is no better if we ignore entirely the trial court's instructions and consider only the asserted "inconsistency" between the Government's theory at the outset of the trial and the opinion of the Court of Appeals. As we have noted, it was unnecessary on the Government's theory to show whether the unreported income and technical ownership of assets were attributable to petitioner or his wife. It was enough that petitioner and his wife jointly had unreported income, that petitioner knew it, and that he, jointly with her, wilfully filed a false return in an attempt to evade the taxes for which he as well as she was liable in full. All that the Court of Appeals did was to find that an added fact, unnecessary to the Government's theory, could have been inferred by the jury—i. e., that the income and assets were petitioner's.

It is plain that this conclusion was in no way inconsistent with the thesis the Government had urged. It would be enough, we note, that the prosecution's theory was valid and that the evidence supported it if that was all that was submitted to the jury. *Nye & Nissen v. United States*, 336 U. S. 613, 618. The even simpler

point here is that the "theory" of the Court of Appeals departs from the prosecution's trial theory only in going beyond it. If the evidence supports the conclusion of the appellate court, as we think it clearly does, it is *a fortiori* sufficient to support the Government's theory at the trial.²⁹ What petitioner complains of as inconsistency, if it existed at all, was favorable to him.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals, affirming petitioner's conviction, should be affirmed.

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²⁹ Thus, there is no problem here like the one which in *Nye & Nissen* formed the basis of the dissenting opinion of Mr. Justice Frankfurter, joined by Mr. Justice Jackson and Mr. Justice Rutledge. 336 U. S. at 620-627.